

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JOHN OLIVER SNOW,

Petitioner,

v.

RENEE BAKER, et al.,

Respondents.

Case No. 2:03-cv-00292-MMD-CWH

ORDER

**I. INTRODUCTION**

This action is a petition for a writ of habeas corpus by John Oliver Snow, a Nevada prisoner sentenced to death. There are, before the Court, a motion by respondents to dismiss Snow's second amended habeas corpus petition, and a motion by Snow for an evidentiary hearing. In this order, the Court resolves those motions, granting respondents' motion to dismiss in part and denying it in part, and denying Snow's motion for an evidentiary hearing.

**II. BACKGROUND FACTS AND PROCEDURAL HISTORY**

The following is the statement of facts and procedural history, as set forth by the Nevada Supreme Court in its 1985 opinion on Snow's direct appeal:

As the hired assassin in the conspiracy to kill Harry Wham, Snow was paid several thousand dollars by the principal members of the conspiracy: Peggy Wham, Harry's wife, and her lover, Joseph Douglas Parker (Doug Parker). Also involved were Kathy Faltinowski, Peggy's daughter and Harry's step-daughter, and John David Parker (John Parker), Kathy's lover and the brother of Doug. [Footnote omitted.]

The conspiracy to kill Harry Wham began in the fall of 1982. Kathy Faltinowski testified that she overheard a conversation between Doug

1 Parker and her mother in late November during which Peggy Wham said  
2 she wanted her husband killed. Sally Cook, Peggy's sister, testified that  
3 Doug Parker told her that he, John Parker and Peggy were going to have  
4 Harry Wham killed by hiring someone from back east. This conversation  
5 took place between Christmas and New Year's 1982. At that time, Snow  
6 shared an apartment at 801 Elizabeth, in Newark, New Jersey, with his  
7 common-law wife, Ingrid Smith.

8 In early January 1983, Kathy Faltinowski drove with John and Doug  
9 Parker to Los Angeles and picked up John Biancone at the airport.  
10 Biancone also lived in New Jersey. Kathy overheard Doug ask Biancone  
11 to murder Harry Wham. Biancone agreed to commit the crime for \$5,000  
12 in advance and \$5,000 after the murder was completed. Peggy Wham  
13 gave Kathy Faltinowski \$5,000 to give to Doug. Peggy said she had stolen  
14 the money from the safe at the Keyboard Lounge which she owned with  
15 Harry Wham. Biancone then left Las Vegas. About one week before  
16 January 26, 1983, Kathy Faltinowski saw Biancone who is white, with  
17 Snow, who is black, in Las Vegas.

18 On January 26, 1983, Harry Wham was shot in what appeared to be a  
19 robbery. Harry told police that he parked his pick-up on the street near his  
20 town house around 11:00 p.m. A black man got out of the passenger side  
21 of a nearby car and demanded that Harry get out of his truck, hand over  
22 his money, and turn around. Harry thought he saw a white male on the  
23 driver's side. The black man then shot Harry in the neck. Harry was  
24 injured but spent only twenty-four hours in the hospital. Harry remarked at  
25 the time that he did not believe it was a genuine robbery. After the  
26 shooting, Doug Parker told Kathy Faltinowski and John Parker that  
27 Biancone drove the car the night of January 26 and that Snow shot Harry  
28 Wham in the back of the head.

Between January 26 and February 13, 1983, John Parker and Doug  
Parker told Kathy Faltinowski that Snow and Biancone [footnote omitted]  
were going to come back and finish the job. During this same period,  
Sally Cook heard John and Doug talking about how "the man" was  
impatient and wanted to finish the job. John then said he would call the  
man and took out a slip of paper that had the words "John Snow" and  
"New Jersey" written on it, as well as an address or a phone number.

A few days before February 13, 1983, Peggy Wham gave John Parker the  
key to the Wham garage. When Kathy Faltinowski was present, John and  
Peggy cleaned out the garage and arranged boxes at the side to form a  
hiding place. Arlen Edwards, Harry Wham's next door neighbor, testified  
about the existence of the hiding place immediately after Harry Wham was  
murdered in the garage.

At 1:30 p.m. on February 13, 1983, Kathy Faltinowski and John Parker  
drove to the Golden City Motel to pick up Snow. He came out of Room  
106. Snow was wearing a dark pinstripe suit. He had a revolver with a  
silencer on it. The three drove to Peggy and Harry Wham's town house on  
Pecos Way in Las Vegas. John unlocked the Whams' garage door using  
the key given him by Peggy. Snow put on rubber gloves and hid behind  
the boxes. John and Kathy Faltinowski left the Whams around 2:00 p.m.

1 Arlen and Jody Edwards lived in the town house next door to the Whams.  
2 At 4:20 p.m. on February 13, 1983, Arlen and Jody walked out of their  
3 house and into their garage. They both heard "popping" noises and then  
4 saw a black man in a dark suit run from the Wham garage. Arlen saw only  
5 part of the man's face and could not identify Snow as that man. Arlen  
6 chased the man and lost sight of him as he ran across a desert area  
7 toward the Wagon Wheel Apartments on Pecos Road. Kathy Faltinowski  
8 lived in the Wagon Wheel Apartments about four blocks from the Wham  
9 town house.

10 At Snow's trial, Jody Edwards testified that she saw all of the black man's  
11 face as he paused just outside the Whams' garage. She identified Snow  
12 as that man in court. Jody admitted that she testified at the previous trial  
13 of Peggy Wham that she could not identify the man who ran from the  
14 garage. Jody testified that she had lied before because she had been  
15 threatened by Peggy and by Kathy Faltinowski.

16 Immediately after the shooting on February 13, 1983, Arlen Edwards  
17 found Harry Wham sitting in his car bleeding heavily. Harry died before  
18 the paramedics arrived. His death was due to multiple gunshot wounds in  
19 the face and head.

20 Around 4:30 p.m., on February 13, 1983, John Parker and Kathy  
21 Faltinowski were driving down Pecos Road. They saw Snow running  
22 towards Kathy's apartment. They returned to the apartment joining Sally  
23 Cook who was also there. Sally testified that a few minutes later a black  
24 man in a dark suit burst in demanding a ride. John asked Sally to give the  
25 black man, whom he called John Snow, a ride. Sally refused. Kathy  
26 Faltinowski drove Snow back to the Golden City Motel. During the drive,  
27 Snow told Kathy that he had just shot her stepfather.

28 On February 16, 1983, Sally Cook spoke with a friend about the Wham  
murder. The friend, Richard Hansen, advised her to go to the police but  
Sally would not. Hansen reported this to the police. Hansen agreed to  
wear a microphone and transmitting device when he next spoke with  
Sally. The police taped a subsequent conversation between him and Sally.  
As a result of this conversation, the police arrested Peggy Wham, Kathy  
Faltinowski, John and Doug Parker on the afternoon on February 17,  
1983.

In the morning of February 17, 1983, Doug Parker told Sally Cook that he  
had just given the hit man \$7,000 and that the hit man was on his way to  
San Francisco. Snow himself testified that he flew from Las Vegas to San  
Francisco on that date. From a pay phone at the San Francisco airport, a  
call was made just after twelve noon that day to the home of the parents of  
the Parker brothers. The call was charged to the telephone at 801  
Elizabeth, Snow's apartment in Newark, New Jersey. The mother of Doug  
and John Parker testified that she answered the telephone in her home in  
the early afternoon of February 17, 1983. The caller left a message asking  
Doug to get in touch with Johnny. Another call shortly after the first was  
placed from the same pay phone at the San Francisco airport and was  
charged to the same number in New Jersey. This call was made to a  
friend of Snow's, Olivia Burnett, living in Fairfield, California. Burnett  
testified that Snow called her that day to come pick him up at the airport.

1 Police investigators obtained additional information from Sally Cook which  
2 lead to Snow being indicted for Harry Wham's murder. A warrant for  
3 Snow's arrest was issued and programmed into the National Crime  
4 Information computer. On March 4, 1983, Snow was arraigned in Superior  
5 Court in New Jersey on unrelated charges. He was fingerprinted. Snow's  
6 fingerprints called up the Nevada arrest warrant from the computer. As a  
7 result, Snow was arrested and booked for the murder of Harry Wham.

8 Snow denied knowing either Doug or John Parker. In his wallet when  
9 Snow was arrested was a piece of paper with "Doug" on it and the  
10 telephone number of the home of the Parkers' parents. Snow also told  
11 police that the last time he had been in Las Vegas was in 1966 or 1967.  
12 At trial, evidence was introduced that Snow's fingerprint had been found in  
13 Room 106 at the Golden City Motel on February 17, 1983. Witnesses from  
14 the motel identified Snow as the man who stayed in Room 106 for several  
15 days in February 1983.

16 Snow was charged with conspiracy to commit murder, first degree murder  
17 with use of a deadly weapon and attempted murder. He was convicted of  
18 conspiracy to commit murder and first degree murder with use of a deadly  
19 weapon. At the penalty hearing on the first degree murder conviction, the  
20 State produced evidence that Snow pleaded guilty in 1962 to robbing  
21 three victims in separate incidents. Following the penalty hearing, the jury  
22 returned a verdict finding three aggravating circumstances: that the  
23 murder was committed by a person previously convicted of a crime  
24 involving the use or threat of violence; that the murder was committed  
25 during the commission or attempt of a burglary; that the murder was  
26 committed for the purpose of receiving money or other things of monetary  
27 value. The jury found no mitigating circumstances and sentenced Snow to  
28 death.

16 *Snow v. State*, 101 Nev. 439, 441-44, 705 P.2d 632, 634-37 (1985). The Nevada  
17 Supreme Court affirmed Snow's conviction and sentence on August 28, 1985. *Snow*,  
18 101 Nev. at 449, 705 P.2d at 639. The United States Supreme Court denied certiorari  
19 on February 24, 1986. *Snow v. Nevada*, 475 U.S. 1031 (1986).

20 Snow filed his first state habeas corpus petition on February 24, 1989.  
21 Respondents' Exhibit 4.<sup>1</sup> The state district court denied that petition on November 19,  
22 1986. Respondents' Exhibit 5. Snow appealed. Respondents' Exhibits 6a, 6b. On  
23 August 27, 1987, the Nevada Supreme Court affirmed the denial of the petition, and  
24 ordered the appeal dismissed. Respondents' Exhibit 7. The United States Supreme  
25

26  
27 <sup>1</sup>The exhibits identified in this order as "Respondents' Exhibits" were filed by  
28 respondents in support of their motion to dismiss and are found in the record at dkt. no.  
147. The exhibits identified in this order as "Petitioner's Exhibits" were filed by Snow  
and are found in the record at dkt. nos. 116, 138, and 158.

1 Court denied Snow's petition for certiorari on November 30, 1987. *Snow v. Sumner*,  
2 484 U.S. 970 (1987).

3 On November 12, 1987, Snow filed, in the state district court, a motion for a new  
4 trial based on his alleged discovery of new evidence. The state district court denied that  
5 motion on procedural grounds on November 17, 1987, and the Nevada Supreme Court  
6 affirmed on September 6, 1989. Respondents' Exhibit 8; *Snow v. State*, 105 Nev. 521,  
7 779 P.2d 96 (1989).

8 On December 22, 1987, Snow filed his first federal habeas corpus action, and  
9 that case was assigned case number CV-N-870615-ECR. Snow voluntarily dismissed  
10 that action on August 3, 1988.

11 On December 28, 1989, Snow filed his second state habeas petition.  
12 Respondents' Exhibit 9. The state district court conducted an evidentiary hearing and  
13 then denied that petition on December 8, 1992. Respondents' Exhibit 10. On March  
14 19, 1993, the Nevada Supreme Court dismissed Snow's appeal from that ruling.  
15 Respondents' Exhibit 11.

16 On March 21, 1994, Snow initiated his second federal habeas corpus action, and  
17 that action was designated case number CV-S-94-0278-PMP-LRL. That action was  
18 dismissed on March 20, 1997. See Petitioner's Exhibits 233, 234.

19 On April 16, 1997, Snow filed his third state habeas corpus petition.  
20 Respondents' Exhibit 12. The state district court denied that petition, as procedurally  
21 barred, on March 25, 2002. Respondents' Exhibit 17. The Nevada Supreme Court  
22 affirmed that ruling on December 10, 2002. Respondents' Exhibit 19.

23 On October 22, 1997, Snow filed, in the state district court, a supplemental  
24 motion for a new trial, based upon alleged juror misconduct, and that motion was denied  
25 by the state district court on December 31, 1997. See Respondents' Exhibit 17, p. 4.

26 On March 13, 2003, Snow initiated this, his third, federal habeas corpus action  
27 (Case Number 2:03-cv-00292-MMD-CWH). Counsel was appointed to represent Snow  
28 (dkt. nos. 4, 9, 12, 14, 18, 19). Snow conducted discovery and, on November 26, 2007,

1 he filed a first amended habeas petition (dkt. no. 115). On April 14, 2008, upon a  
 2 stipulation of the parties, this action was stayed to allow Snow to return to state court to  
 3 further exhaust his claims (dkt. nos. 121, 122).

4 On April 25, 2008, Snow initiated his fourth state habeas action. Respondents'  
 5 Exhibits 20a, 20b. That petition was dismissed by the state district court on April 23,  
 6 2009. Respondents' Exhibit 22. Snow appealed. Respondents' Exhibit 23. On July 27,  
 7 2011, the Nevada Supreme Court affirmed. Respondents' Exhibit 24.

8 On January 4, 2012, the stay of this federal habeas action was lifted (dkt. no.  
 9 134). On March 9, 2012, Snow filed a second amended habeas petition (dkt. no. 137).

10 On August 31, 2012, respondents filed their motion to dismiss (dkt. no. 146).  
 11 Snow filed an opposition to that motion on January 3, 2013 (dkt. no. 157). Respondents  
 12 replied on April 2, 2013 (dkt. no. 165). Snow filed corrections to his opposition to the  
 13 motion on May 28, 2013 (dkt. nos. 169, 170).

14 On January 3, 2013, when he filed his opposition to the motion to dismiss, Snow  
 15 also filed a motion for evidentiary hearing (dkt. no. 159). Respondents filed an  
 16 opposition to that motion on April 2, 2013 (dkt. no. 166). Snow filed a reply in support of  
 17 the motion for evidentiary hearing on May 28, 2013 (dkt. no. 171).

### 18 **III. STATUTE OF LIMITATIONS**

#### 19 **A. Legal Standards**

20 Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),  
 21 there is a one-year statute of limitations applicable to federal habeas corpus petitions.  
 22 The statute provides:

23 (d)(1) A 1-year period of limitation shall apply to an application for a writ of  
 24 habeas corpus by a person in custody pursuant to the judgment of a State  
 court. The limitation period shall run from the latest of –

25 (A) the date on which the judgment became final by the conclusion  
 26 of direct review or the expiration of the time for seeking such  
 review;

27 (B) the date on which the impediment to filing an application  
 28 created by State action in violation of the Constitution or laws of the

United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A-D).

The petitioner is entitled to statutory tolling of the limitations period while a “properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

The AEDPA limitations period is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 2562, 177 L.Ed.2d 130, 145 (2010). A petitioner may be entitled to equitable tolling if he can show “‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland*, 130 S.Ct. at 2562 (*quoting Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Respondents argue that Snow’s entire second amended petition is barred by the statute of limitations and should be dismissed.

#### **B. Expiration Of The One-Year Limitations Period**

Snow’s conviction became final before the AEDPA became effective on April 24, 1996. See *Snow v. Nevada*, 475 U.S. 1031 (1986) (United States Supreme Court’s denial of certiorari, on February 24, 1986, following Snow’s direct appeal). For such a petitioner, with a conviction that became final prior to the effective date of the AEDPA, the one-year limitations period for federal habeas claims began to run on the effective date of the AEDPA, April 24, 1996, unless tolled – either equitably tolled or tolled by the pendency of a properly filed state action under 28 U.S.C. § 2244(d)(2) – or unless another triggering date applies under 28 U.S.C. § 2244(d)(1)(B), (C) or (D). See *Patterson v. Stewart*, 251 F.3d 1243, 1245-46 (9th Cir. 2001).

1           Snow initiated this federal habeas action on March 13, 2003. See Petition for Writ  
2 of Habeas Corpus (dkt. no. 10) (received March 13, 2003). That was more than six  
3 years after the AEDPA limitations period began to run, without tolling or an alternative  
4 triggering date.

5           Snow argues that the March 20, 1997, “closure order” in his prior federal habeas  
6 action, Case Number CV-S-94-0278-PMP-LRL, “constitutes a stay rather than a  
7 dismissal of the 1994 federal habeas proceeding,” that this current federal habeas  
8 action is, in reality, the same action as Case Number CV-S-94-0278-PMP-LRL, and that  
9 this action should, therefore, be considered to have been filed in 1994, well before the  
10 one-year limitations period began to run. See Opposition to Motion to Dismiss (dkt. no.  
11 157), pp. 1-9. That argument is without merit. The March 27, 1997, order did not merely  
12 administratively close Case Number CV-S-94-0278-PMP-LRL; rather, the court ordered  
13 Case Number CV-S-94-0278-PMP-LRL “dismissed without prejudice.” See Petitioner’s  
14 Exhibits 233, 234. The March 20, 1997, order was therefore not a “closure order;” it was  
15 an order of dismissal. There is no language in the March 20, 1997, order suggesting  
16 that Case Number CV-S-94-0278-PMP-LRL was to be closed subject to reopening, or  
17 otherwise stayed. See *id.* The record is clear that Case Number CV-S-94-0278-PMP-  
18 LRL was dismissed on March 20, 1997. This current federal habeas corpus action was  
19 initiated about six (6) years later, on March 13, 2003.

20           Therefore, all the claims made by Snow in this action, which was filed over six (6)  
21 years after the effective date of the AEDPA, are barred by the statute of limitations,  
22 absent tolling, or unless another triggering date is applicable under 28 U.S.C. §  
23 2244(d)(1)(B), (C) or (D).

### 24           **C. Statutory Tolling**

25           Under the AEDPA, “[t]he time during which a properly filed application for State  
26 post-conviction or other collateral review . . . is pending shall not be counted toward any  
27 period of limitation . . . .” 28 U.S.C. § 2244(d)(2). While Snow did participate in state  
28 proceedings, the timing of these proceedings does not trigger statutory tolling.

1 On the effective date of the AEDPA, April 24, 1996, when the one-year limitations  
2 would have begun to run, Snow was litigating his second federal habeas action. That  
3 federal habeas action, Case Number CV-S-94-0278-PMP-LRL, was filed on March 21,  
4 1994, and was dismissed on March 20, 1997, a little over a month before the one-year  
5 limitations period would have run out. The pendency of a federal habeas action,  
6 however, does not toll the statute of limitations, under 28 U.S.C. § 2244(d)(2). *Duncan*  
7 *v. Walker*, 533 U.S. 167 (2001).

8 About a week before the one-year limitations period was to run out, Snow  
9 initiated a third state habeas action on April 16, 1997. See Respondents' Exhibit 12.  
10 The state district court denied that petition on March 25, 2002, ruling that it was untimely  
11 under NRS 34.726(1), and barred as a successive petition under NRS 34.810.  
12 Respondents' Exhibit 17. The Nevada Supreme Court affirmed that ruling on December  
13 10, 2002. Respondents' Exhibit 19. When "the state court reject[s]" a petition for post-  
14 conviction relief "as untimely, it [is] not 'properly filed'" and does not toll the limitations  
15 period. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

16 Therefore, Snow does not benefit from statutory tolling under 28 U.S.C. §  
17 2244(d)(2).

#### 18 **D. Equitable Tolling**

19 A petitioner may be entitled to equitable tolling if he can show "'(1) that he has  
20 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood  
21 in his way' and prevented timely filing." *Holland*, 130 S.Ct. at 2562 (*quoting Pace*, 544  
22 U.S. at 418). The Court finds that equitable tolling applies.

23 The dismissal of Snow's 1994 federal habeas corpus action, Case Number CV-  
24 S-94-0278-PMP-LRL, occurred just as the AEDPA was going into effect. Indeed the  
25 motion to dismiss was filed and briefed before the April 24, 2006, effective date of the  
26 AEDPA. After supplemental briefing, regarding, among other things, the applicability of  
27 the AEDPA to the 1994 case, the case was dismissed on March 20, 1997, less than a  
28 year after the AEDPA went into effect. Because the motion to dismiss in Case Number

CV-S-94-0278-PMP-LRL was resolved when the AEDPA was new, there appears to have been no awareness, on the part of the litigants or the Court, that the statute of limitations imposed by the AEDPA could pose a bar to Snow's filing of a new federal habeas action. The Supreme Court had not yet decided *Duncan* (holding that there is no statutory tolling under 28 U.S.C. § 2244(d)(2) during the pendency of a federal habeas action), or *Pace* (holding that there is no statutory tolling under 28 U.S.C. § 2244(d)(2) during the pendency of an untimely-filed state post-conviction proceeding). Because there was no awareness of the possibility that the AEDPA statute of limitations could bar a subsequent federal habeas action, the Court did not extend to Snow the option to abandon his unexhausted claims and proceed on his exhausted claims, or seek a stay. See *Jefferson v. Budge*, 419 F.3d 1013 (9th Cir.2005) (granting *pro se* petitioner equitable tolling from the dismissal of prior federal habeas action to the initiation of subsequent federal habeas action, where court did not give petitioner the option of abandoning unexhausted claims).

The danger that Snow might be barred by the statute of limitations from filing a subsequent federal habeas petition, if his 1994 action was dismissed, was not mentioned in the parties' briefing of the motion to dismiss, and it was not mentioned in the March 20, 1997, order of the Court dismissing the action. See Petitioner's Exhibit 233. Indeed, in the March 20, 1997, order, the court appears to have assumed that there would be no statute-of-limitations bar to the filing of a subsequent federal habeas action after the exhaustion of claims in state court. *Id.* For example, at the end of the order, the Court stated: "*When the subsequent federal proceeding is commenced, a copy of this order shall be attached to the petition.*" *Id.* at 3 (emphasis added).

There is no indication in the record that, with respect to the dismissal of the 1994 federal habeas action, or during the pendency of his third state habeas action, Snow was ever other than diligent in pursuing his rights. And, the Court concludes that, in view of the unsettled and uncertain law in 1996 and 1997 regarding the operation of the AEDPA statute of limitations, combined with the Court's assumption, and indication, that

1 Snow would be able to initiate a subsequent federal habeas action after exhausting his  
2 claims in state court, there were extraordinary circumstances that combined, without  
3 fault on Snow's part, to present a statute of limitations bar to this action.

4 The Court, therefore, will grant Snow equitable tolling of the AEDPA limitations  
5 period from March 20, 1997, when his 1994 federal habeas action was dismissed, to  
6 March 13, 2003, when this, Snow's third, federal habeas action was initiated.  
7 See *Jefferson*, 419 F.3d at 1017 (under similar circumstances, granting equitable tolling  
8 "from the date the first habeas petition was dismissed until the date he filed his second  
9 habeas petition").

#### 10 **E. Claim-by-Claim Statute of Limitations Analysis**

11 With the benefit of equitable tolling from March 20, 1997, to March 13, 2003,  
12 Snow's original petition in this action (dkt. no. 10) was timely filed, within the one-year  
13 AEDPA limitations period. When the equitable tolling began, on March 20, 1997, there  
14 were only thirty-five (35) days left in the limitations period, as the limitations period was  
15 to expire on April 24, 1997. See *Patterson v. Stewart*, 251 F.3d 1243, 1245-46 (9th Cir.  
16 2001). After the equitable tolling ceased, on March 13, 2003, those remaining thirty-five  
17 (35) days of the limitations period ran out on April 17, 2003. Therefore, Snow's first  
18 amended petition (dkt. no. 115), filed November 26, 2007, and his second amended  
19 petition (dkt. no. 137), filed March 9, 2012, were filed well after the limitations period  
20 expired.

21 Snow argues, however, that certain of the claims in his second amended petition  
22 (1) qualify separately for tolling, relate back to claims in his original March 10, 2003,  
23 petition or are timely, under 28 U.S.C. § 2244(d)(1)(B), because of a state-created  
24 impediment to the raising of the claims; or (2) are timely, under 28 U.S.C. §  
25 2244(d)(1)(D), because of his later discovery of the factual predicates of the claims.  
26 The remainder of the statute of limitations analysis in this order, then, is a consideration  
27 of the timeliness of each of the claims in Snow's second amended petition, given that  
28 the Court finds Snow entitled to equitable tolling from March 20, 1997, to March 13,

2003, and in light of Snow's claim-specific arguments that his claims should be treated as timely.

### 1. Claim 1

In Claim 1, Snow claims that his constitutional rights were violated "due to the state's failure to disclose material exculpatory and impeachment information, to the state's elicitation of false testimony from its witnesses, to the state's failure to correct the false testimony of its witnesses, and to a persistent pattern of misconduct by the state which distorted the fact-finding process and rendered Mr. Snow's trial fundamentally unfair." Second Amended Petition, p. 11. Claim 1 includes several subparts. See *id.* at 11-41. In Claim 1A, Snow alleges that "the prosecution failed to disclose material impeachment information and failed to correct false testimony regarding undisclosed benefits received by state's witness Richard Morelli." *Id.* at 14. In Claim 1B, Snow alleges that "the state failed to disclose material exculpatory and impeachment information pertaining to Kathy Faltinowski, the only testifying co-conspirator who purportedly could identify Mr. Snow as the hit man who killed Harry Wham." *Id.* at 22. In Claim 1C, Snow alleges that "the state failed to disclose material exculpatory and impeachment evidence relating to Arlen and Jody Edwards." *Id.* at 26. In Claim 1D, Snow alleges that "the state failed to disclose material exculpatory and impeachment information relating to Melinda Barwick." *Id.* at 29. In Claim 1E, Snow alleges that "the state failed to disclose material exculpatory and impeachment evidence from information generated by law enforcement that could have been used to show that the police failed to adequately investigate alternative suspects in the offense." *Id.* at 30. In Claim 1, there are also sections designated F and G, but the material in those sections does not appear to set forth separate subclaims, but rather, appears to include argument relative to Claims 1A, 1B, 1C, 1D, and 1E.

Claims in an amended petition for writ of habeas corpus relate back to the original petition, under Federal Rule of Civil Procedure 15(c), if they arise out of "a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle*

1 v. *Felix*, 545 U.S. 644, 659 (2005). “An amended habeas petition . . . does not relate  
2 back . . . when it asserts a new ground for relief supported by facts that differ in both  
3 time and type from those the original pleading set forth.” *Id.* at 650.

4 The Court finds that all of Claims 1A, 1B, 1C, 1D, and 1E relate back to Grounds  
5 25 and 28 in Snow’s original petition. See Petition for Writ of Habeas Corpus (dkt. no.  
6 10), Grounds 25, 28. Grounds 25 and 28 of Snow’s original petition asserted that the  
7 prosecution withheld exculpatory and impeachment evidence. Claims 1A, 1B, 1C, 1D,  
8 and 1E, involve the same “core of operative facts” as those claims in the original  
9 petition. See *Mayle*, 545 U.S. at 664 n.7 (citing, with approval, *Mandacina v. United*  
10 *States*, 328 F.3d 995, 1000-01 (8th Cir.2003)); see also *Valdovinos v. McGrath*, 598  
11 F.3d 568, 575 (9th Cir.2010), *vacated on other grounds*, — U.S. —, 131 S.Ct. 1042,  
12 178 L.Ed.2d 860 (2011) (judgment vacated and case remanded for further consideration  
13 in light of *Harrington v. Richter*, 562 U.S. —, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).  
14 Claims 1A, 1B, 1C, 1D, and 1E, therefore, are not barred by the statute of limitations.

## 15 2. Claim 2

16 In Claim 2, Snow claims that his constitutional rights were violated “due to the  
17 state’s actions in sending Richard Morelli, an agent of the government, into the jail to  
18 obtain incriminating statements from Mr. Snow in violation of his right to counsel.”  
19 Second Amended Petition, p. 42.

20 There is no claim in Snow’s original petition based on the same core of operative  
21 facts as Claim 2. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore, this  
22 claim does not relate back to Snow’s original petition.

23 Snow claims, however, that Claim 2 is independently timely, and subject to  
24 equitable tolling, because the State suppressed, and he was delayed in discovering, the  
25 facts underlying the claim. However, it is apparent from the record that no later than  
26 March 22, 2004, Snow learned of the facts on which he bases Claim 2. See Motion for  
27 Leave to Conduct Discovery (dkt. no. 32), pp. 17-21. Snow does not assert any valid  
28 reason for waiting for more than three years, after discovering the factual basis for

1 Claim 2, before pleading that claim in this action. The Court, therefore, rejects Snow's  
2 argument that he is entitled to relief under 28 U.S.C. § 2244(d)(1)(B) or (D) with regard  
3 to Claim 2.

4 Snow also claims that discovery proceedings in this case delayed his filing of an  
5 amended petition including Claim 2. See Opposition to Motion to Dismiss, p. 23. Citing  
6 an order entered by the court in this action on October 8, 2003 (dkt. no. 22), Snow  
7 argues: "Under this Court's scheduling orders, Mr. Snow was required to conduct and  
8 complete formal discovery before filing an amended petition." *Id.* However, the October  
9 8, 2003, order did not require Snow to complete his discovery before filing an amended  
10 petition. Rather, the order stated: "If necessary, petitioner shall file an amended petition  
11 on or before September 10, 2004." Order entered October 8, 2003 (dkt. no. 22), p. 2.  
12 There was no order of the Court precluding the filing of an amended petition before the  
13 completion of the discovery proceedings, or without conducting any discovery at all. The  
14 Court rejects Snow's argument that he is entitled to equitable tolling with regard to  
15 Claim 2.

16 Claim 2 is barred by the statute of limitations.

### 17 3. Claim 3

18 In Claim 3, Snow claims that his constitutional rights were violated "because his  
19 death sentence is disproportionate to that of his co-defendants, being the product of  
20 racial discrimination by state officials." Second Amended Petition, p. 45. The Court finds  
21 that Claim 3 is based on the same core of operative facts as Grounds 8 and 24 of  
22 Snow's original petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Grounds  
23 8, 24. Claim 3, therefore, relates back to Snow's original petition, and is not barred by  
24 the statute of limitations.

### 25 4. Claim 4

26 In Claim 4, Snow claims that his constitutional rights were violated "due to the  
27 seating of jurors on Mr. Snow's jury who were not impartial." Second Amended Petition,  
28 p. 62. This claim concerns jurors Lorraine Van Compennolle and Dorothy Hansen. *Id.*

1 at 62-69. The Court finds that Claim 4 is based on the same core of operative facts as  
2 Ground 19 of Snow's original petition. See Petition for Writ of Habeas Corpus (dkt. no.  
3 10), Ground 19. Claim 4, therefore, relates back to Snow's original petition, and is not  
4 barred by the statute of limitations.

5 **5. Claim 5**

6 In Claim 5, Snow claims that his constitutional rights were violated "due to the  
7 trial court's failure to remove juror Gordon Buchanan, who was actually and impliedly  
8 biased against Mr. Snow, and who contaminated the jury with extraneous information."  
9 Second Amended Petition, p. 70.

10 There is no claim in Snow's original petition based on the same core of operative  
11 facts as Claim 5. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore this  
12 claim does not relate back to Snow's original petition.

13 Snow claims that Claim 5 is independently timely because of his late discovery of  
14 the factual basis for the claim. See Opposition to Motion to Dismiss, pp. 24-26.  
15 However, in the course of that argument, Snow concedes that he discovered the factual  
16 basis for the claim when "he obtained a declaration from Buchanan signed on October  
17 31, 2005." *Id.* at 24. That was more than two (2) years before this claim appeared in any  
18 petition in this action; this claim first appeared in Snow's first amended petition, which  
19 was filed November 26, 2007. Snow does not assert any valid reason for waiting more  
20 than two (2) years after discovering the factual basis for Claim 5 before pleading that  
21 claim in this action. The Court rejects Snow's argument that he is entitled to relief under  
22 28 U.S.C. § 2244(d)(1)(D) with regard to Claim 5. Claim 5 is barred by the statute of  
23 limitations.

24 **6. Claim 6**

25 In Claim 6, Snow claims that his constitutional rights were violated "due to  
26 manipulation during the grand jury selection process which deprived Mr. Snow of his  
27 right to a fair cross-section of the community." Second Amended Petition, p. 78.

28 ///

1           There is no claim in Snow's original petition based on the same core of operative  
2 facts as Claim 6. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore this  
3 claim does not relate back to Snow's original petition.

4           Snow claims that Claim 6 is independently timely because of his late discovery of  
5 the factual basis for the claim. See Opposition to Motion to Dismiss, pp. 26-27.  
6 However, Snow concedes that he discovered the factual basis for the claim on January  
7 6, 2004. *Id.* at 26 ("The FPD did not receive disclosure of responsive records from the  
8 District Attorney until January 6, 2004."); see also *id.* at 53-54 (stating that the FPD had  
9 "fully developed" the factual basis for Claim 6 by August 2004). That was more than  
10 three (3) years before this claim appeared in any petition in this action; it first appeared  
11 in the first amended petition, which was filed November 26, 2007. Snow does not  
12 assert any valid reason for waiting for more than three (3) years after discovering the  
13 factual basis for Claim 6 before pleading that claim in this action. The Court, therefore,  
14 rejects Snow's argument that he is entitled to relief under 28 U.S.C. § 2244(d)(1)(D)  
15 with regard to Claim 6. Claim 6 is barred by the statute of limitations.

#### 16                   7.       **Claim 7**

17           In Claim 7, Snow claims that his constitutional rights were violated "due to his  
18 trial, conviction and sentencing by a jury selected from a venire in which members of his  
19 race were systematically excluded and under-represented." Second Amended Petition,  
20 p. 81. The Court finds that Claim 7 is based on the same core of operative facts as  
21 Ground 7 of Snow's original petition. See Petition for Writ of Habeas Corpus (dkt. no.  
22 10), Ground 7. Claim 7, therefore, relates back to Snow's original petition, and is not  
23 barred by the statute of limitations.

#### 24                   8.       **Claim 8**

25           In Claim 8, Snow claims that his constitutional rights were violated "due to  
26 improper arguments by the prosecution which distorted the fact finding process and  
27 rendered the trial fundamentally unfair." Second Amended Petition, p. 84. The Court  
28 finds that Claim 8 is based on the same core of operative facts as Ground 21 of Snow's

1 original petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 21. Claim  
2 8, therefore, relates back to Snow's original petition, and is not barred by the statute of  
3 limitations.

4 **9. Claim 9**

5 In Claim 9, Snow claims that his constitutional rights were violated "due to the  
6 trial court's exclusion of the exculpatory testimony from Terry Hardaway and David  
7 Springfield." Second Amended Petition, p. 90. The Court finds that Claim 9 is based on  
8 the same core of operative facts as Ground 1 of Snow's original petition. See Petition  
9 for Writ of Habeas Corpus (dkt. no. 10), Ground 1. Claim 9, therefore, relates back to  
10 Snow's original petition, and is not barred by the statute of limitations.

11 **10. Claim 10**

12 In Claim 10, Snow claims that his constitutional rights were violated "due to the  
13 ineffective assistance of trial counsel during the pretrial, trial, sentencing, and post-trial  
14 proceedings of Mr. Snow's trial." Second Amended Petition, p. 93. Claim 10 includes  
15 several subparts. See *id.* at 93-130.

16 In Claim 10A, Snow claims that his trial counsel "was ineffective for failing to  
17 conduct adequate voir dire." Second Amended Petition, p. 93. The Court finds that  
18 Claim 10A is based on the same core of operative facts as Ground 15 of Snow's original  
19 petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 15. Claim 10A,  
20 therefore, relates back to Snow's original petition, and is not barred by the statute of  
21 limitations.

22 In Claim 10B, Snow claims that his trial counsel was ineffective for "completely  
23 abandoning his role as advocate for Mr. Snow" during penalty phase closing arguments.  
24 Second Amended Petition, p. 100. There is no claim in Snow's original petition based  
25 on the same core of operative facts as Claim 10B. See Petition for Writ of Habeas  
26 Corpus (dkt. no. 10). Therefore this claim does not relate back to Snow's original  
27 petition. Snow does not assert any other basis upon which Claim 10B might be  
28 considered timely. Claim 10B, therefore, is barred by the statute of limitations.

1           In Claim 10C, Snow claims that his trial counsel was ineffective “for failing to  
2   object and offer rebuttal evidence to in-court identifications of Mr. Snow which were the  
3   result of impermissibly suggestive photo spreads and unreliable cross-racial  
4   identifications.” Second Amended Petition, p. 104. The Court finds that Claim 10C is  
5   based on the same core of operative facts as Ground 5 of Snow’s original petition.  
6   See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 5. Claim 10C, therefore,  
7   relates back to Snow’s original petition, and is not barred by the statute of limitations.

8           In Claim 10D, Snow claims that his trial counsel was ineffective “for failing to offer  
9   alternative grounds for the admission of the testimony of Mr. Hardaway and Mr.  
10   Springfield, and for failing to offer their testimony at the penalty phase.” Second  
11   Amended Petition, p. 108. The Court finds that Claim 10D is based on the same core of  
12   operative facts as Grounds 1 and 2 of Snow’s original petition. See Petition for Writ of  
13   Habeas Corpus (dkt. no. 10), Grounds 1, 2. Claim 10D, therefore, relates back to  
14   Snow’s original petition, and is not barred by the statute of limitations.

15           In Claim 10E, Snow claims that his trial counsel was ineffective “for failing to  
16   investigate and call potential alibi witnesses who could have corroborated Mr. Snow’s  
17   own testimony that he was not in Nevada on the day Harry Wham was killed.” Second  
18   Amended Petition, p. 112. The Court finds that Claim 10E is based on the same core of  
19   operative facts as Ground 3 of Snow’s original petition. See Petition for Writ of Habeas  
20   Corpus (dkt. no. 10), Ground 3. Claim 10E, therefore, relates back to Snow’s original  
21   petition, and is not barred by the statute of limitations.

22           In Claim 10F, Snow claims that his trial counsel was ineffective “for failing to  
23   properly object and move for a hearing regarding *ex parte* communications and  
24   misconduct by juror Buchanan.” Second Amended Petition, p. 114. There is no claim in  
25   Snow’s original petition based on the same core of operative facts as Claim 10F.  
26   See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore this claim does not  
27   relate back to Snow’s original petition. Snow claims that Claim 10F is independently  
28   timely because of his late discovery of the factual basis for the claim. See Opposition to

1 Motion to Dismiss, pp. 24-26. However, in the course of that argument, Snow concedes  
2 that he discovered the factual basis for this claim when “he obtained a declaration from  
3 Buchanan signed on October 31, 2005.” *Id.* at 24. That was more than two (2) years  
4 before this claim appeared in any petition in this action; the claim first appeared in the  
5 first amended petition, which was filed November 26, 2007. Snow does not assert any  
6 valid reason for waiting more than two (2) years after discovering the factual basis for  
7 Claim 10F before pleading that claim in this action. The Court, therefore, rejects Snow’s  
8 argument that he is entitled to relief under 28 U.S.C. § 2244(d)(1)(D) with regard to  
9 Claim 10F. Claim 10F is barred by the statute of limitations.

10 In Claim 10G, Snow claims that his trial counsel was ineffective “for failing to  
11 locate and present records to prove that Mr. Snow received a large settlement in a car  
12 accident lawsuit.” Second Amended Petition, p. 114. There is no claim in Snow’s  
13 original petition based on the same core of operative facts as Claim 10G. See Petition  
14 for Writ of Habeas Corpus (dkt. no. 10). Therefore this claim does not relate back to  
15 Snow’s original petition. Snow does not assert any other basis upon which Claim 10G  
16 might be considered timely. Claim 10G, therefore, is barred by the statute of limitations.

17 In Claim 10H, Snow claims that his trial counsel was ineffective “for failing to  
18 impeach Sally Cook’s testimony regarding the height of the hit man.” Second Amended  
19 Petition, p. 115. The Court finds that this claim shares a common core of operative fact  
20 with Ground 5 of Snow’s original petition, in which he claimed that his trial counsel was  
21 ineffective, in part as follows:

22 [T]rial counsel failed to cross-examine any of the witnesses (especially  
23 Jody Edwards) relative to the cross-racial identification issue, failed to  
24 present any expert testimony relative to the frailties and vicissitudes of  
25 cross-racial identification, and failed even to request a jury instruction as  
to the difficulties of ... eyewitness identification in general, and cross-racial  
identification in specific.

26 Petition for Writ of Habeas Corpus (dkt. no. 10), p. 12 of attachment. Claim 10H relates  
27 back to Snow’s original petition, and is not barred by the statute of limitations.

28 ///

1 In Claim 10I, Snow claims that his trial counsel was ineffective “for failing to  
2 impeach Ms. Faltinowski’s testimony regarding the ride that she allegedly gave Mr.  
3 Snow to the Golden City Motel immediately after the crime.” Second Amended Petition,  
4 p. 116. There is no claim in Snow’s original petition based on the same core of  
5 operative facts as Claim 10I. See Petition for Writ of Habeas Corpus (dkt. no. 10).  
6 Snow argues that this claim shares a common core of operative fact with Ground 5 of  
7 his original petition. See Opposition to Motion to Dismiss, pp. 37-38. However, Ground  
8 5 of the original petition has nothing in common, factually, with Ground 10I. See Petition  
9 for Writ of Habeas Corpus (dkt. no. 10), pages 11-12 of attachment. Ground 10I does  
10 not relate back to Snow’s original petition, and is barred by the statute of limitations.

11 In Claim 10J, Snow claims that his trial counsel was ineffective “for failing to  
12 adequately cross-examine Detective Dillard and impeach important aspects of his  
13 testimony.” Second Amended Petition, p. 116. There is no claim in Snow’s original  
14 petition based on the same core of operative facts as Claim 10J. See Petition for Writ  
15 of Habeas Corpus (dkt. no. 10). Therefore this claim does not relate back to Snow’s  
16 original petition. Snow does not assert any other basis upon which Claim 10J might be  
17 considered timely. Claim 10J, therefore, is barred by the statute of limitations.

18 In Claim 10K, Snow claims that his trial counsel was ineffective “for failing to  
19 investigate or present any mitigating evidence at Mr. Snow’s capital sentencing  
20 hearing.” Second Amended Petition, p. 120. The Court finds that Claim 10K is based  
21 on the same core of operative facts as Ground 4 of Snow’s original petition.  
22 See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 4. Claim 10K, therefore,  
23 relates back to Snow’s original petition, and is not barred by the statute of limitations.

24 In Claim 10L, Snow claims that his trial counsel was ineffective “for failing to  
25 object to the guilt phase jury instructions regarding premeditation, implied malice, and  
26 reasonable doubt,” as well as “the penalty phase instructions preventing the jury from  
27 considering sympathy and the improper instruction which failed to apprise the jury that it  
28 had to unanimously find at least one statutory aggravating circumstance.” Second

1 Amended Petition, pp. 127-28. The Court finds that, to the extent it involves the jury  
2 instructions regarding implied malice, reasonable doubt, and sympathy, Claim 10L is  
3 based on the same core of operative facts as Grounds 13, 18, and 26 of Snow's original  
4 petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Grounds 13, 18, 26.  
5 However, to the extent that Claim 10L involves the jury instructions regarding  
6 premeditation and the requirement that aggravating circumstances be found  
7 unanimously by the jury, the Court finds that there is no claim in Snow's original petition  
8 based on the same core of operative facts as those claims. Therefore, Claim 10L does  
9 not relate back to Snow's original petition and is barred by the statute of limitations, to  
10 the extent it involves the jury instructions regarding premeditation and the requirement  
11 that aggravating circumstances be found unanimously by the jury; the remainder of  
12 Claim 10L relates back, and is not barred by the statute of limitations.

13 In Claim 10M, Snow claims that his trial counsel was ineffective for "failing to  
14 object to the penalty phase jury instruction which told the jury that they could not  
15 consider sympathy for Mr. Snow in selecting a sentence less than death," for "failing to  
16 object to the penalty phase jury instruction which failed to inform the jury that they had  
17 to unanimously find one or more statutory aggravating circumstances," and for "failing to  
18 object to the penalty phase jury instruction which allowed the jury to find that Mr. Snow's  
19 crime was aggravated because it was committed during the course of a burglary."  
20 Second Amended Petition, pp. 128-29.<sup>2</sup> The Court finds that, to the extent it involves  
21 the jury instructions regarding sympathy, and regarding the burglary aggravating  
22 circumstance, Claim 10M is based on the same core of operative facts as Grounds 12  
23 and 18 of Snow's original petition. See Petition for Writ of Habeas Corpus (dkt. no. 10),  
24 Grounds 12, 18. However, to the extent that Claim 10M involves the lack of a jury  
25 instruction regarding the requirement that aggravating circumstances be found

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26  
27 <sup>2</sup>Claim 10M is repetitive of Claim 10L to the extent it challenges the no-sympathy  
28 instruction, and to the extent it concerns the lack of an instruction directing the jury that  
they had to unanimously find at least one statutory aggravating circumstance.

1 unanimously, the Court finds that there is no claim in Snow's original petition based on  
2 the same core of operative facts as that claim. Therefore, Claim 10M does not relate  
3 back to Snow's original petition and is barred by the statute of limitations to the extent it  
4 involves the lack of a jury instruction regarding the requirement that aggravating  
5 circumstances be found unanimously by the jury; the remainder of Claim 10M relates  
6 back, and is not barred by the statute of limitations.

7 In Claim 10N, Snow claims that his trial counsel was ineffective "for failing to  
8 investigate and raise Claims Three through Nine, Twelve through Fifteen, Nineteen and  
9 Twenty." Second Amended Petition, p. 130. The Court will address Claim 10N as it  
10 relates to trial counsel's ineffectiveness for investigating and raising each of the  
11 referenced claims. With respect to the claim that trial counsel was ineffective for failure  
12 to raise Claim 3, the Court finds that claim is based on the same core of operative facts  
13 as Grounds 8 and 24 of Snow's original petition (see Petition for Writ of Habeas Corpus  
14 (dkt. no. 10), Grounds 8, 24), and that claim, therefore, relates back to Snow's original  
15 petition and is not barred by the statute of limitations. With respect to the claim that trial  
16 counsel was ineffective for failure to raise Claim 4, the Court finds that claim is based on  
17 the same core of operative facts as Ground 19 of Snow's original petition (see Petition  
18 for Writ of Habeas Corpus (dkt. no. 10), Ground 19) and that claim, therefore, relates  
19 back to Snow's original petition and is not barred by the statute of limitations. With  
20 respect to the claim that trial counsel was ineffective for failure to raise Claim 5, the  
21 Court finds that there is no claim in Snow's original petition based on the same core of  
22 operative facts as the claim, that Snow does not show that he is entitled to relief under  
23 28 U.S.C. § 2244(d)(1)(D) with regard to the claim, and that, therefore, the claim is  
24 barred by the statute of limitations. With respect to the claim that trial counsel was  
25 ineffective for failure to raise Claim 6, the Court finds that there is no claim in Snow's  
26 original petition based on the same core of operative facts as the claim, that Snow does  
27 not show that he is entitled to relief under 28 U.S.C. § 2244(d)(1)(D) with regard to the  
28 claim, and that, therefore, the claim is barred by the statute of limitations. With respect

1 to the claim that trial counsel was ineffective for failure to raise Claim 7, the Court finds  
2 that claim is based on the same core of operative facts as Ground 7 of Snow's original  
3 petition (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 7) and that claim,  
4 therefore, relates back to Snow's original petition and is not barred by the statute of  
5 limitations. With respect to the claim that trial counsel was ineffective for failure to raise  
6 Claim 8, the Court finds that claim is based on the same core of operative facts as  
7 Ground 21 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt. no.  
8 10), Ground 21) and that claim, therefore, relates back to Snow's original petition and is  
9 not barred by the statute of limitations. With respect to the claim that trial counsel was  
10 ineffective for failure to raise Claim 9, the Court finds that claim is based on the same  
11 core of operative facts as Ground 1 of Snow's original petition (see Petition for Writ of  
12 Habeas Corpus (dkt. no. 10), Ground 1) and that claim, therefore, relates back to  
13 Snow's original petition and is not barred by the statute of limitations. With respect to  
14 the claim that trial counsel was ineffective for failure to raise Claim 12A, the Court finds  
15 that there is no claim in Snow's original petition based on the same core of operative  
16 facts as the claim, and that, therefore, the claim does not relate back to Snow's original  
17 petition and is barred by the statute of limitations. With respect to the claim that trial  
18 counsel was ineffective for failure to raise Claim 12B, the Court finds that claim is based  
19 on the same core of operative facts as Ground 13 of Snow's original petition  
20 (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 13) and that claim,  
21 therefore, relates back to Snow's original petition and is not barred by the statute of  
22 limitations. With respect to the claim that trial counsel was ineffective for failure to raise  
23 Claim 13A, the Court finds that claim is based on the same core of operative facts as  
24 Ground 18 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt. no.  
25 10), Ground 18) and that claim, therefore, relates back to Snow's original petition and is  
26 not barred by the statute of limitations. With respect to the claim that trial counsel was  
27 ineffective for failure to raise Claim 13B, the Court finds that there is no claim in Snow's  
28 original petition based on the same core of operative facts as the claim, and that,

1 therefore, the claim does not relate back to Snow's original petition and is barred by the  
2 statute of limitations. With respect to the claim that trial counsel was ineffective for  
3 failure to raise Claim 13C, the Court finds that there is no claim in Snow's original  
4 petition based on the same core of operative facts as the claim, and that, therefore, the  
5 claim does not relate back to Snow's original petition and is barred by the statute of  
6 limitations. With respect to the claim that trial counsel was ineffective for failure to raise  
7 Claim 14, the Court finds that claim is based on the same core of operative facts as  
8 Ground 12 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt. no.  
9 10), Ground 12) and that claim, therefore, relates back to Snow's original petition and is  
10 not barred by the statute of limitations. With respect to the claim that trial counsel was  
11 ineffective for failure to raise Claim 15, the Court finds that claim is based on the same  
12 core of operative facts as Ground 26 of Snow's original petition (see Petition for Writ of  
13 Habeas Corpus (dkt. no. 10), Ground 26) and that claim, therefore, relates back to  
14 Snow's original petition and is not barred by the statute of limitations. With respect to  
15 the claim that trial counsel was ineffective for failure to raise Claim 19, the Court finds  
16 that there is no claim in Snow's original petition based on the same core of operative  
17 facts as the claim, and that, therefore, the claim does not relate back to Snow's original  
18 petition and is barred by the statute of limitations. With respect to the claim that trial  
19 counsel was ineffective for failure to raise Claim 20, the Court finds that there is no  
20 claim in Snow's original petition based on the same core of operative facts as the claim,  
21 that Snow does not show that he is entitled to relief under 28 U.S.C. § 2244(d)(1)(D)  
22 with regard to the claim, and that, therefore, the claim is barred by the statute of  
23 limitations.

#### 24 **11. Claim 11**

25 In Claim 11, Snow claims that his constitutional rights were violated "because of  
26 the trial court's failure to properly instruct the jury concerning the weight to be given  
27 accomplice testimony." Second Amended Petition, p. 131. The Court finds that Claim  
28 11 is based on the same core of operative facts as Ground 10 of Snow's original

1 petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 10. Claim 11,  
2 therefore, relates back to Snow's original petition and is not barred by the statute of  
3 limitations.

#### 4 **12. Claim 12**

5 In Claim 12, Snow claims that his constitutional rights were violated "because of  
6 the trial court's failure to properly instruct the jury concerning the elements of the capital  
7 offense." Second Amended Petition, p. 133. Claim 12 has two subparts. See *id.* at 133-  
8 36.

9 In Claim 12A, Snow claims that his constitutional rights were violated by a jury  
10 instruction given by the court regarding premeditation and deliberation. Second  
11 Amended Petition, pp. 133-35. There is no claim in Snow's original petition based on  
12 the same core of operative facts as Claim 12A. See Petition for Writ of Habeas Corpus  
13 (dkt. no. 10). Therefore this claim does not relate back to Snow's original petition. Snow  
14 does not assert any other basis upon which Claim 12A might be considered timely.  
15 Claim 12A, therefore, is barred by the statute of limitations.

16 In Claim 12B, Snow claims that his constitutional rights were violated by a jury  
17 instruction given by the court regarding express and implied malice aforethought.  
18 Second Amended Petition, pp. 135-36. The Court finds that Claim 12B is based on the  
19 same core of operative facts as Ground 13 of Snow's original petition. See Petition for  
20 Writ of Habeas Corpus (dkt. no. 10), Ground 13. Claim 12B, therefore, relates back to  
21 Snow's original petition and is not barred by the statute of limitations.

#### 22 **13. Claim 13**

23 In Claim 13, Snow claims that his constitutional rights were violated "because of  
24 the trial Court's failure to properly instruct the jury during the sentencing hearing."  
25 Second Amended Petition, p. 137. Claim 13 has three subparts. See *id.* at 137-40.

26 In Claim 13A, Snow claims that his constitutional rights were violated by a jury  
27 instruction stating that a verdict may not be influenced by sympathy. Second Amended  
28 Petition, pp. 137-38. The Court finds that Claim 13A is based on the same core of

operative facts as Ground 18 of Snow's original petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 18. Claim 13A, therefore, relates back to Snow's original petition and is not barred by the statute of limitations.

In Claim 13B, Snow claims that his constitutional rights were violated because "his jury was never instructed that it must unanimously find the existence of one aggravating circumstance. . . ." Second Amended Petition, p. 138 (emphasis removed). There is no claim in Snow's original petition based on the same core of operative facts as Claim 13B. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore this claim does not relate back to Snow's original petition. Snow does not assert any other basis upon which Claim 13B might be considered timely. Claim 13B is barred by the statute of limitations.

In Claim 13C, Snow claims that his constitutional rights were violated because "[t]he jury was never instructed that it had to find the second element of death eligibility, that the aggravating circumstances were not outweighed by the mitigation, beyond a reasonable doubt." Second Amended Petition, p. 139. There is no claim in Snow's original petition based on the same core of operative facts as Claim 13C. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore this claim does not relate back to Snow's original petition. Snow does not assert any other basis upon which Claim 13C might be considered timely. Claim 13C is barred by the statute of limitations.

#### **14. Claim 14**

In Claim 14, Snow claims that his constitutional rights were violated "due to the jury's finding of death eligibility based upon the burglary aggravating circumstance, which was predicated solely upon an intent to commit murder when entering a building." Second Amended Petition, p. 141. The Court finds that Claim 14 is based on the same core of operative facts as Ground 12 of Snow's original petition. See Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 12. Claim 14, therefore, relates back to Snow's original petition and is not barred by the statute of limitations.

///

1                   **15. Claim 15**

2           In Claim 15, Snow claims that his constitutional rights were violated “because the  
3 reasonable doubt instruction given during both the trial and sentencing phase[s]  
4 improperly minimized the state’s burden of proof.” Second Amended Petition, p. 144.  
5 The Court finds that Claim 15 is based on the same core of operative facts as Ground  
6 26 of Snow’s original petition. See Petition for Writ of Habeas Corpus (dkt. no. 10),  
7 Ground 26. Claim 15, therefore, relates back to Snow’s original petition and is not  
8 barred by the statute of limitations.

9                   **16. Claim 16**

10          In Claim 16, Snow claims that his constitutional rights were violated “because Mr.  
11 Snow was not afforded effective assistance of counsel on appeal.” *Id.* at 146. Claim 16  
12 includes several subparts. See *id.* Specifically, in Claim 16, Snow claims that his  
13 constitutional rights were violated by the failure of his appellate counsel to raise, on  
14 appeal, in whole or in part, Claims 3, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 19, and 20.

15          With respect to the claim that appellate counsel was ineffective for failure to raise  
16 Claim 3, the Court finds that claim is based on the same core of operative facts as  
17 Grounds 8 and 24 of Snow’s original petition (see Petition for Writ of Habeas Corpus  
18 (dkt. no. 10), Grounds 8, 24) and that claim, therefore, relates back to Snow’s original  
19 petition and is not barred by the statute of limitations. With respect to the claim that  
20 appellate counsel was ineffective for failure to raise Claim 5, the Court finds that there is  
21 no claim in Snow’s original petition based on the same core of operative facts as the  
22 claim, and that Snow does not show that he is entitled to relief under 28 U.S.C. §  
23 2244(d)(1)(D) with regard to the claim; therefore, the claim is barred by the statute of  
24 limitations. With respect to the claim that appellate counsel was ineffective for failure to  
25 raise Claim 6, the Court finds that there is no claim in Snow’s original petition based on  
26 the same core of operative facts as the claim, that Snow does not show that he is  
27 entitled to relief under 28 U.S.C. § 2244(d)(1)(D) with regard to the claim, and that,  
28 therefore, the claim is barred by the statute of limitations. With respect to the claim that

1 appellate counsel was ineffective for failure to raise Claim 7, the Court finds that claim is  
2 based on the same core of operative facts as Ground 7 of Snow's original petition  
3 (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 7) and that claim,  
4 therefore, relates back to Snow's original petition and is not barred by the statute of  
5 limitations. With respect to the claim that appellate counsel was ineffective for failure to  
6 raise Claim 8, the Court finds that claim is based on the same core of operative facts as  
7 Ground 21 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt. no.  
8 10), Ground 21) and that claim, therefore, relates back to Snow's original petition and is  
9 not barred by the statute of limitations. With respect to the claim that appellate counsel  
10 was ineffective for failure to raise Claim 9, the Court finds that claim is based on the  
11 same core of operative facts as Ground 1 of Snow's original petition (see Petition for  
12 Writ of Habeas Corpus (dkt. no. 10), Ground 1) and that claim, therefore, relates back to  
13 Snow's original petition and is not barred by the statute of limitations. With respect to  
14 the claim that appellate counsel was ineffective for failure to raise Claim 11, the Court  
15 finds that claim is based on the same core of operative facts as Ground 10 of Snow's  
16 original petition (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 10) and  
17 that claim, therefore, relates back to Snow's original petition and is not barred by the  
18 statute of limitations. With respect to the claim that appellate counsel was ineffective for  
19 failure to raise Claim 12A, the Court finds that there is no claim in Snow's original  
20 petition based on the same core of operative facts as the claim, and that, therefore, the  
21 claim is barred by the statute of limitations. With respect to the claim that appellate  
22 counsel was ineffective for failure to raise Claim 12B, the Court finds that claim is based  
23 on the same core of operative facts as Ground 13 of Snow's original petition  
24 (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 13) and that claim,  
25 therefore, relates back to Snow's original petition and is not barred by the statute of  
26 limitations. With respect to the claim that appellate counsel was ineffective for failure to  
27 raise Claim 13A, the Court finds that claim is based on the same core of operative facts  
28 as Ground 18 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt.

no. 10), Ground 18) and that claim, therefore, relates back to Snow's original petition and is not barred by the statute of limitations. With respect to the claim that appellate counsel was ineffective for failure to raise Claim 13B, the Court finds that there is no claim in Snow's original petition based on the same core of operative facts as the claim, and that, therefore, the claim is barred by the statute of limitations. With respect to the claim that appellate counsel was ineffective for failure to raise Claim 13C, the Court finds that there is no claim in Snow's original petition based on the same core of operative facts as the claim, and that, therefore, the claim is barred by the statute of limitations. With respect to the claim that appellate counsel was ineffective for failure to raise Claim 14, the Court finds that claim is based on the same core of operative facts as Ground 12 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 12) and that claim, therefore, relates back to Snow's original petition and is not barred by the statute of limitations. With respect to the claim that appellate counsel was ineffective for failure to raise Claim 15, the Court finds that claim is based on the same core of operative facts as Ground 26 of Snow's original petition (see Petition for Writ of Habeas Corpus (dkt. no. 10), Ground 26) and that claim, therefore, relates back to Snow's original petition and is not barred by the statute of limitations. With respect to the claim that appellate counsel was ineffective for failure to raise Claim 19, the Court finds that there is no claim in Snow's original petition based on the same core of operative facts as the claim, and that, therefore, the claim is barred by the statute of limitations. With respect to the claim that appellate counsel was ineffective for failure to raise Claim 20, the Court finds that there is no claim in Snow's original petition based on the same core of operative facts as the claim, that Snow does not show that he is entitled to relief under 28 U.S.C. § 2244(d)(1)(D) with regard to the claim, and that, therefore, the claim is barred by the statute of limitations.

#### **17. Claim 17**

In Claim 17, Snow claims that his constitutional rights were violated "because the state courts unfairly limited the issues to be raised in post-conviction proceedings and

1 the ability of counsel to litigate those issues.” Second Amended Petition, p. 148. There  
2 is no claim in Snow’s original petition based on the same core of operative facts as  
3 Claim 17. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore, this claim  
4 does not relate back to Snow’s original petition. Snow does not assert any other basis  
5 upon which Claim 17 might be considered timely. Claim 17 is barred by the statute of  
6 limitations.

7 **18. Claim 18**

8 In Claim 18, Snow claims that his constitutional rights were violated “by the  
9 ineffective assistance of state post-conviction counsel.” Second Amended Petition, p.  
10 155. There is no claim in Snow’s original petition based on the same core of operative  
11 facts as Claim 18. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore, this  
12 claim does not relate back to Snow’s original petition. Snow does not assert any other  
13 basis upon which Claim 18 might be considered timely. Claim 18 is barred by the  
14 statute of limitations.

15 **19. Claim 19**

16 In Claim 19, Snow claims that his constitutional rights were violated “due to the  
17 cumulative errors in the admission of evidence and instructions, gross misconduct by  
18 state officials and witnesses, and the systematic deprivation of [Mr. Snow’s] right to the  
19 effective assistance of counsel.” Second Amended Petition, p. 160. This is a cumulative  
20 error claim. The Court finds that it is timely to the same extent that the claims it  
21 incorporates are timely. Therefore, it is not barred by the statute of limitations.

22 **20. Claim 20**

23 In Claim 20, Snow claims that his “death sentence is invalid under the state and  
24 federal constitutional guarantees of due process, equal protection, and a reliable  
25 sentence because execution by lethal injection violates the constitutional prohibition  
26 against cruel and unusual punishments.” Second Amended Petition, p. 162.

27 ///

28 ///

1           There is no claim in Snow's original petition based on the same core of operative  
2 facts as Claim 20. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore this  
3 claim does not relate back to Snow's original petition.

4           Snow claims that, with respect to Claim 20, he is entitled to relief under 28 U.S.C.  
5 § 2244(d)(1)(D), because "a copy of the [Nevada Department of Corrections'  
6 confidential execution manual] was obtained for the first time by the FPD in April 2006."  
7 Opposition to Motion to Dismiss, p. 27. That, however, was still well over a year before  
8 this claim first appeared in a petition in this case – in Snow's first amended petition, filed  
9 November 26, 2007 (dkt. no. 115). Moreover, the Court rejects Snow's claim that he is  
10 entitled to relief under 28 U.S.C. § 2244(d)(1)(D) because news media first published  
11 stories in 2011 and 2012 stating that the execution chamber at the Nevada State Prison  
12 is unfit for carrying out executions; Snow does not show that the discovery of that  
13 information was necessary to establish a factual basis for this claim.

14           Claim 20 is barred by the statute of limitations.

## 15                           **21.    Claim 21**

16           In Claim 21, Snow claims that his constitutional rights were violated "because Mr.  
17 Snow's capital trial, sentencing, and review on direct appeal were conducted before  
18 state judicial officers whose tenure in office was not during good behavior but whose  
19 tenure was dependent on popular election." Second Amended Petition, p. 174. There  
20 is no claim in Snow's original petition based on the same core of operative facts as  
21 Claim 21. See Petition for Writ of Habeas Corpus (dkt. no. 10). Therefore, this claim  
22 does not relate back to Snow's original petition. Snow does not assert any other basis  
23 upon which Claim 21 might be considered timely. Claim 21 is barred by the statute of  
24 limitations.

## 25                           **F.    Snow's Request for an Evidentiary Hearing on Statute of Limitations** 26                                   **Issues**

27           In his motion for evidentiary hearing (dkt. no. 159), and the reply he filed in  
28 support of that motion (dkt. no. 171), Snow requests an evidentiary hearing with respect

1 to certain factual matters related to the statute of limitations issues raised by the motion  
2 to dismiss.

3 Snow requests an evidentiary hearing concerning his argument that the March  
4 20, 1997, "closure order" in Case Number CV-S-94-0278-PMP-LRL, constitutes a stay  
5 rather than a dismissal of the 1994 federal habeas proceeding, and that this current  
6 federal habeas action is in reality the same action as Case Number CV-S-94-0278-  
7 PMP-LRL. See Reply to Opposition to Motion for Evidentiary Hearing (dkt. no. 171), pp.  
8 2-14. Snow also requests an evidentiary hearing with respect to his argument that he is  
9 entitled to equitable tolling of the AEDPA limitations period from March 20, 1997, when  
10 his 1994 federal habeas action was dismissed, to March 13, 2003, when this, his third,  
11 federal habeas action was initiated. See *id.* As is discussed above, the Court finds,  
12 based on the record, that while the dismissal order in Case Number CV-S-94-0278-  
13 PMP-LRL clearly provides for dismissal of the action, Snow is nevertheless entitled to  
14 equitable tolling. Therefore, there is no need for an evidentiary hearing on either of  
15 these issues.

16 Snow requests an evidentiary hearing "to prove that he meets the statutory  
17 requirements under 28 U.S.C. § 2244(d)(1)(B, D), based upon his diligence in  
18 uncovering the factual bases of the information contained in Claims One and Two of his  
19 second amended petition." Motion for Evidentiary Hearing (dkt. no. 159), p. 4. As is  
20 discussed above, with respect to Claims 1A, 1B, 1C, 1D, and 1E, the Court rules that  
21 those claims are not barred by the statute of limitations. With respect to Ground 2, it is  
22 plain from the record – and admitted by Snow – that he obtained the information forming  
23 the factual basis for the claim by 2004, three (3) years before he first asserted the claim  
24 in his habeas petition. Based on Snow's admissions in that regard with respect to Claim  
25 2, and based on the record, the Court rejects Snow's argument under 28 U.S.C. §  
26 2244(d)(1)(B) and (D). There is no factual dispute, and no need for an evidentiary  
27 hearing, with respect to that issue.

28 ///

1 Snow requests an evidentiary hearing with regard to Claims 5, 6, 10(F, I, and N),  
2 and 20, concerning the question of when he was able to discover the factual bases for  
3 those claims. See Motion for Evidentiary Hearing, pp. 4-5. However, in addressing  
4 these issues the Court looks to Snow's own concessions regarding when he discovered  
5 the factual bases of these claims. There is no factual dispute, and no need for an  
6 evidentiary hearing with respect to these issues.

#### 7 **IV. PROCEDURAL DEFAULT**

##### 8 **A. Legal Standards**

9 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails  
10 to comply with the state's procedural requirements in presenting his claims is barred  
11 from obtaining a writ of habeas corpus in federal court by the adequate and  
12 independent state ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731–32  
13 (1991) ("Just as in those cases in which a state prisoner fails to exhaust state remedies,  
14 a habeas petitioner who has failed to meet the State's procedural requirements for  
15 presenting his federal claims has deprived the state courts of an opportunity to address  
16 those claims in the first instance."). Where such a procedural default constitutes an  
17 adequate and independent state ground for denial of habeas corpus, the default may be  
18 excused only if "a constitutional violation has probably resulted in the conviction of one  
19 who is actually innocent," or if the prisoner demonstrates cause for the default and  
20 prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

21 To demonstrate cause for a procedural default, the petitioner must "show that  
22 some objective factor external to the defense impeded" his efforts to comply with the  
23 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external  
24 impediment must have prevented the petitioner from raising the claim. See *McCleskey*  
25 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner  
26 bears "the burden of showing not merely that the errors [complained of] constituted a  
27 possibility of prejudice, but that they worked to his actual and substantial disadvantage,  
28 infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*,

1 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170  
2 (1982).

3 In their motion to dismiss, respondents assert that Claims 1, 2, 3, 4, 5, 6, 7, 8, 9,  
4 10A, 10B, 10C, 10E, 10F, 10G, 10H, 10I, 10J, 10K (in part), 10L, 10M, 10N (in part), 11,  
5 12, 13, 15, 16 (in part), 17, 18, 19, 20, and 21, of Snow's second amended petition, are  
6 procedurally defaulted and should be dismissed on that ground.

### 7 **B. The Procedural Default**

8 In his fourth state habeas petition, filed April 25, 2008, Snow presented all of the  
9 claims that are set forth in his second amended petition in this federal action.  
10 See Petition for Writ of Habeas Corpus (Post-Conviction), Respondents' Exhibits 20a  
11 and 20b. That petition was dismissed on procedural grounds by the state district court.  
12 See Findings of Fact, Conclusions of Law and Order, Respondents' Exhibit 22. In its  
13 order, ruling on the appeal from the dismissal of Snow's fourth state habeas petition, the  
14 Nevada Supreme Court stated:

15 Because he filed his petition approximately 23 years after this court  
16 resolved his direct appeal, the petition was untimely under NRS 34.726(1).  
17 The petition was also successive and therefore procedurally barred  
18 pursuant to NRS 34.810(1)(b)(2). And, as it appears that the State  
specifically pleaded laches, the petition was subject to dismissal under  
NRS 34.800.

19 Order of Affirmance, Respondents' Exhibit 24, p. 2. The Nevada Supreme Court went  
20 on to rule that Snow did not show cause and prejudice regarding his default, to reject  
21 Snow's argument that he should be excused from the state procedural default rules  
22 because the court had arbitrarily and inconsistently applied them, and to reject Snow's  
23 argument that he is actually innocent of the death penalty. *Id.* at 3-8.

### 24 **C. Adequacy of the State Procedural Rules**

25 A state procedural rule is "adequate" if it is "clear, consistently applied, and well-  
26 established at the time of the petitioner's purported default." *Calderon v. United States*  
27 *Dist. Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996) (citation and internal quotation  
28 marks omitted); see also *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (State procedural

1 rule adequate if “firmly established and regularly followed by the time as of which it is to  
2 be applied.” (citation and internal quotation marks omitted)); *Lambright v. Stewart*, 241  
3 F.3d 1201, 1203 (9th Cir.2001).

4 In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003), the court of appeals  
5 announced a burden-shifting test for analyzing adequacy. Under *Bennett*, the State  
6 carries the initial burden of pleading “the existence of an independent and adequate  
7 state procedural ground as an affirmative defense.” *Id.* at 586. The burden then shifts to  
8 the petitioner “to place that defense in issue,” which the petitioner may do “by asserting  
9 specific factual allegations that demonstrate the inadequacy of the state procedure,  
10 including citation to authority demonstrating inconsistent application of the rule.” *Id.* If  
11 the petitioner meets this burden, “the ultimate burden” of proving the adequacy of the  
12 procedural rule rests with the State, which must demonstrate “that the state procedural  
13 rule has been regularly and consistently applied in habeas actions.” *Id.*; see also *King v.*  
14 *Lamarque*, 464 F.3d 963, 966-67 (9th Cir. 2006).

15 In this case, the respondents meet their initial burden under *Bennett* by asserting  
16 that the Nevada Supreme Court’s application of NRS 34.726, the state statute of  
17 limitations for habeas actions, constituted an independent and adequate state  
18 procedural ground for denying relief. See Motion to Dismiss, p. 67.

19 In asserting their procedural default argument, the respondents do not appear to  
20 rely on the Nevada Supreme Court’s application of NRS 34.800 or 34.810. See *id.* With  
21 respect to NRS 34.810 (successive petitions), this is presumably because the Ninth  
22 Circuit Court of Appeals has held that statute to be inadequate to support the procedural  
23 default defense in federal court. See *Valerio v. Crawford*, 306 F.3d 742, 777-78 (9th Cir.  
24 2002). At any rate, respondents meet their burden with respect to their assertion that  
25 the Supreme Court’s application of NRS 34.726 constituted an independent and  
26 adequate bar to federal habeas review of certain of Snow’s claims, and the analysis  
27 proceeds with respect to the court’s application of that statute.

28 ///

1 In response, Snow does not generally challenge the adequacy of NRS 34.726.<sup>3</sup>

2 The Court notes that the Ninth Circuit Court of Appeals has rejected the  
3 argument that the Nevada Supreme Court has inconsistently applied NRS 34.726, and  
4 has held it to be adequate to support a procedural bar. See *Loveland v. Hatcher*, 231  
5 F.3d 640, 642-63 (9th Cir. 2000) (regarding NRS 34.726, as of 1993); *Moran v.*  
6 *McDaniel*, 80 F.3d 1261, 1269-70 (9th Cir. 1996) (regarding NRS 34.726, as of 1996).  
7 This Court is not aware of any ruling by the Ninth Circuit Court of Appeals finding NRS  
8 34.726 to be inadequate to support a state procedural bar.

9 This Court, then, rules NRS 34.726 to be adequate to support the procedural  
10 default defense asserted by respondents.

#### 11 **D. Independence**

12 A state procedural bar is independent unless it appears “to rest primarily on  
13 federal law or appears to be interwoven with federal law.” *Coleman*, 501 U.S. at 734;  
14 see also *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000). Also, if the state  
15 court’s decision fails “to specify which claims were barred for which reasons,” the  
16 ambiguity may serve to defeat the independence of the state procedural bar. *Valerio v.*  
17 *Crawford*, 306 F.3d 742, 775 (9th Cir. 2002); *Koerner v. Grigas*, 328 F.3d 1039, 1050  
18 (9th Cir. 2003).

19 In response to the motion to dismiss, Snow does not make any argument that the  
20 procedural default rulings invoked by the state are generally not independent of federal  
21 law, in a manner applicable to all his defaulted claims. See *Opposition to Motion to*  
22 *Dismiss*.<sup>4</sup>

23 ///

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24  
25 <sup>3</sup>Snow does make an argument regarding the adequacy of NRS 34.726 that  
26 applies only to Claim 12A. That argument is addressed below, in the discussion of that  
particular claim.

27 <sup>4</sup>With respect to Claims 1 and 2, Snow does claim that, because of the nature of  
28 those claims, the Nevada Supreme Court’s application of the state procedural rules was  
not independent. The Court addresses that argument below, in the context of its  
consideration of the asserted procedural default of Claims 1 and 2.

**E. Limitations Imposed by the State District Court in the First State Habeas Proceeding**

In his opposition to the motion to dismiss, Snow makes an argument – apparently intended to apply to all the claims alleged by respondents to be procedurally defaulted – that there was cause for the default, as well as prejudice, because of limitations imposed by the state district court on the litigation of his first state habeas action. See Opposition to Motion to Dismiss, pp. 91-96. Snow argues that “the district court’s denial of discovery, of appointment of local counsel, of funds for an investigator, and of expansion of the record was an objective factor external to the defense that prevented Mr. Snow from raising the claims contained in the instant petition sooner.” *Id.* at 91.

Snow’s argument in this regard is without merit. The procedural default at issue is the Nevada Supreme Court’s application of the state statute of limitations, NRS 34.726, to Snow’s fourth state habeas action. See Order of Affirmance, Respondents’ Exhibit 24. Even assuming Snow was hindered, as he claims, by the state district court in the litigation of his first state habeas action, this says nothing of the delay of more than twenty (20) years, between the conclusion of Snow’s first state habeas action, on August 27, 1987, and the initiation of his fourth state habeas action, on April 25, 2008. See Order of Affirmance, Respondents’ Exhibit 24, p. 2 (“Because he filed his petition approximately 23 years after this court resolved his direct appeal, the petition was untimely under NRS 34.726(1).”). The state district court’s handling of Snow’s first state habeas action cannot be considered cause for the procedural default at issue here.

**F. Claims of Ineffective Assistance of Trial Counsel**

With respect to the procedural default of his claims of ineffective assistance of trial counsel, in Claims 10A through 10N, 12, 13, and 15 (see descriptions of each of these claims, *supra*), Snow argues, relying upon *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), that ineffective assistance of counsel in his first state habeas action constitutes cause for the procedural default. See Opposition to Motion to Dismiss, pp. 58-88.

///

1 In *Martinez*, the Supreme Court noted that it had previously held, in *Coleman v.*  
2 *Thompson*, 501 U.S. 722, 746-47 (1991), that “an attorney’s negligence in a  
3 postconviction proceeding does not establish cause” to excuse procedural default.  
4 *Martinez*, 132 S.Ct. at 1319. The court in *Martinez* then “qualif[ied] *Coleman* by  
5 recognizing a narrow exception: inadequate assistance of counsel at initial-review  
6 collateral proceedings may establish cause for a prisoner’s procedural default of a claim  
7 of ineffective assistance at trial.” *Id.* at 1315. The court described “initial-review  
8 collateral proceedings” as “collateral proceedings which provide the first occasion to  
9 raise a claim of ineffective assistance at trial.” *Id.*

10 The Court finds Snow’s argument in this regard to be fundamentally flawed. In  
11 *Martinez*, the petitioner’s procedural default was based on an Arizona rule barring  
12 successive petitions; as such, the petitioner’s procedural default was complete when  
13 counsel in the initial-review collateral proceeding failed to raise certain claims.  
14 See *Martinez*, 132 S.Ct. at 1314. The procedural default at issue in this case is different.  
15 Snow’s procedural default is based on the statute of limitations in NRS § 34.726. The  
16 procedural default occurred because Snow delayed for some twenty-three (23) years,  
17 after his direct appeal ended in August 1985, before he initiated his fourth state habeas  
18 action in April 2008, asserting the claims now held to be procedurally defaulted.  
19 See Order of Affirmance, Respondents’ Exhibit 24, p. 2. The attorney who represented  
20 Snow in his first state habeas action represented Snow for only about a year and a half,  
21 while Snow’s first state habeas action was pending – a very small portion of the time  
22 over which the statute of limitations default occurred. Ineffective assistance of Snow’s  
23 first state post-conviction counsel cannot explain the long delay that led to Snow’s  
24 default under NRS § 34.726. In short, there is an insufficient causal connection between  
25 the alleged ineffective assistance of Snow’s first post-conviction counsel and the  
26 procedural default at issue in this case. Ineffective assistance of counsel in Snow’s first  
27 state habeas action does not function as cause for the procedural default of the claims  
28 of ineffective assistance of trial counsel in Claims 10A through 10N, 12, 13, and 15.

**G. The Nevada Supreme Court's Mandatory Review of Claims on Snow's Direct Appeal**

Snow argues that Claims 3, 8, 11, 12, 13, and 15, were exhausted on direct appeal by virtue of the Nevada Supreme Court's mandatory review of death sentences under NRS 177.055, and, therefore, those claims are not procedurally defaulted. Opposition to Motion to Dismiss, pp. 46-49, 96-103.

At the time of Snow's direct appeal, under NRS 177.055, the Nevada Supreme Court was to independently examine the record to determine (1) whether the evidence supported the finding of the aggravating circumstances, (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases. See *id.* at 96; see also Petitioner's Exhibit 226.

In order to find claims exhausted by virtue of the Nevada Supreme Court's review under NRS 177.055, this Court must be satisfied that such review encompassed the specific factual and federal law grounds advanced by the petitioner in his federal petition. See *Comer v. Schriro*, 463 F.3d 934, 954-56 (9th Cir. 2006) (examining whether petitioner's federal habeas claims were impliedly exhausted under the Arizona Supreme Court's statutory automatic review). In finding implied exhaustion in *Comer*, the court of appeals noted that only claims that are "clearly encompassed within Arizona's independent review" and "readily apparent from the record" will be deemed impliedly exhausted. *Id.* at 956.

In Claim 3, Snow claims that his constitutional rights were violated "because his death sentence is disproportionate to that of his co-defendants, being the product of racial discrimination by state officials." Second Amended Petition, p. 45. Claim 3 raises an issue that is within the scope of the state supreme court's mandatory review: proportionality of the petitioner's death sentence. Moreover, we know that the Nevada Supreme Court reviewed that claim under its mandatory review, because, on the appeal in Snow's first state habeas action, that court stated that it had. On the appeal in his first state habeas action, Snow argued that his appellate counsel had been ineffective

1 because he failed to raise the issue of sentence proportionality. Brief of Appellant,  
2 Respondents' Exhibit 6a, pp. 15-30. In ruling on that claim, the Nevada Supreme Court  
3 stated, regarding its mandatory review on Snow's direct appeal:

4 At that time, NRS 177.055(2) required this court to review whether the  
5 sentence was proportionate to penalties imposed in other cases. We  
6 concluded that the sentence of death was not disproportionate and that it  
7 had not been imposed under passion, prejudice, or any arbitrary factor.  
8 *Snow*, 101 Nev. at 448-49. The habeas court correctly held that we were  
9 aware of the sentences received by the co-defendants when we  
10 conducted our proportionality review. Snow's sentence was not  
11 disproportionate to the other defendants. Although the other conspirators  
were equally culpable, Snow was the hired trigger man, with a lengthy  
criminal and prison record. None of the other defendants had similar  
criminal records. We have upheld disparate death sentences in other  
cases. See *Neuschafer v. State*, 101 Nev. 331, 337, 705 P.2d 7609, 613  
(1985) (death sentence not disproportionate to other defendants who  
received life with or without parole).

12 Order Dismissing Appeal, Respondents' Exhibit 7, pp. 2-3. Thus, the Nevada Supreme  
13 Court itself acknowledged that it ruled on Snow's proportionality claim, as part of its  
14 mandatory review of claims on Snow's direct appeal, and, in so doing, was aware of the  
15 sentences received by Snow's co-defendants. Therefore, Claim 3 is not barred from  
16 litigation in this federal habeas action by the procedural default doctrine.

17 The Court will next address Claims 8, 11, 12, 13 and 15. In Claim 8, Snow  
18 claims that his constitutional rights were violated "due to improper arguments by the  
19 prosecution which distorted the fact finding process and rendered the trial fundamentally  
20 unfair." Second Amended Petition, p. 84. In Claim 11, Snow claims that his  
21 constitutional rights were violated "because of the trial court's failure to properly instruct  
22 the jury concerning the weight to be given accomplice testimony." *Id.* at 131. In Claim  
23 12A, Snow claims that his constitutional rights were violated by a jury instruction given  
24 by the court regarding premeditation and deliberation. *Id.* at 133-35. In Claim 12B,  
25 Snow claims that his constitutional rights were violated by a jury instruction given by the  
26 court regarding express and implied malice aforethought. *Id.* at 135-36. In Claim 13A,  
27 Snow claims that his constitutional rights were violated by a jury instruction stating that  
28 a verdict may not be influenced by sympathy. *Id.* at 137-38. In Claim 13B, Snow claims

1 that his constitutional rights were violated because “his jury was never instructed that it  
 2 must unanimously find the existence of one aggravating circumstance. . . .” *Id.* at 138  
 3 (emphasis removed). In Claim 13C, Snow claims that his constitutional rights were  
 4 violated because “[t]he jury was never instructed that it had to find the second element  
 5 of death eligibility, that the aggravating circumstances were not outweighed by the  
 6 mitigation, beyond a reasonable doubt.” *Id.* at 139. And, in Claim 15, Snow claims that  
 7 his constitutional rights were violated “because the reasonable doubt instruction given  
 8 during both the trial and sentencing phase[s] improperly minimized the state’s burden of  
 9 proof.” *Id.* at 144.

10 This Court finds that Claims 8, 11, 12, 13, and 15 were not necessarily  
 11 encompassed within the mandatory review of the state supreme court. See *Beam v.*  
 12 *Paskett*, 3 F.3d 1301, 1307 (9th Cir.1993), *overruled on other grounds*, *Lambright v.*  
 13 *Stewart*, 191 F.3d 1181 (9th Cir.1999) (en banc) (holding that the Idaho Supreme  
 14 Court’s mandatory review “necessarily” included the claim under consideration). Snow  
 15 cites cases in which the Nevada Supreme Court has referred to federal constitutional  
 16 standards on its mandatory review (see Opposition to Motion to Dismiss, pp. 99-102),  
 17 but neither NRS 177.055 nor Nevada case law obligates the Nevada Supreme Court to  
 18 identify and rule upon federal constitutional issues. See *Sechrest v. Ignacio*, 943  
 19 F.Supp. 1245, 1250 (D.Nev. 1996). Snow has not shown that any of Claims 8, 11, 12,  
 20 13, or 15 are “clearly encompassed” within the scope of NRS 177.055. To conclude  
 21 otherwise would be to apply a fiction that cuts against the policy of federal-state comity  
 22 that underlies the exhaustion and procedural default doctrines. None of Claims 8, 11,  
 23 12, 13, and 15 were exhausted on direct appeal by operation of the mandatory review  
 24 statute. Claims 8, 12, 13, and 15 are procedurally defaulted.<sup>5</sup>

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25 <sup>5</sup>As is discussed, *infra*, in the discussion of Claim 11, that claim is not  
 26 procedurally defaulted, for a different reason: Snow raised Claim 11 in his second state  
 27 habeas action, the claim was dismissed by the state district court, and, before Snow  
 28 could file an opening brief on appeal, the Nevada Supreme Court affirmed, finding the  
 claim barred as a successive petition, under NRS 34.810, which was inadequate to  
 support the defense of procedural default. So, while Claim 11 was not exhausted on  
 (fn. cont...)

1           **H.      Snow's Claim-Specific Arguments Regarding the Procedural Default**

2                   **1.      Claims 1 and 2**

3           In Claim 1, Snow claims that his constitutional rights were violated "due to the  
4 state's failure to disclose material exculpatory and impeachment information, to the  
5 state's elicitation of false testimony from its witnesses, to the state's failure to correct the  
6 false testimony of its witnesses, and to a persistent pattern of misconduct by the state  
7 which distorted the fact-finding process and rendered Mr. Snow's trial fundamentally  
8 unfair." Second Amended Petition, p. 11. Claim 1 includes several subparts. *See id.* at  
9 11-41. In Claim 1A, Snow alleges that "the prosecution failed to disclose material  
10 impeachment information and failed to correct false testimony regarding undisclosed  
11 benefits received by state's witness Richard Morelli." *Id.* at 14. In Claim 1B, Snow  
12 alleges that "the state failed to disclose material exculpatory and impeachment  
13 information pertaining to Kathy Faltinowski, the only testifying co-conspirator who  
14 purportedly could identify Mr. Snow as the hit man who killed Harry Wham." *Id.* at 22. In  
15 Claim 1C, Snow alleges that "the state failed to disclose material exculpatory and  
16 impeachment evidence relating to Arlen and Jody Edwards." *Id.* at 26. In Claim 1D,  
17 Snow alleges that "the state failed to disclose material exculpatory and impeachment  
18 information relating to Melinda Barwick." *Id.* at 29. In Claim 1E, Snow alleges that "the  
19 state failed to disclose material exculpatory and impeachment evidence from  
20 information generated by law enforcement that could have been used to show that the  
21 police failed to adequately investigate alternative suspects in the offense." *Id.* at 30.  
22 Snow also includes sections F and G under Claim 1, although the material in those  
23 subsections does not appear to set forth separate subclaims, but rather, appears to  
24 include argument relative to Claims 1A, 1B, 1C, 1D, and 1E. In Claim 2, Snow claims  
25 that his constitutional rights were violated "due to the state's actions in sending Richard

26  
27           

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*(...fn. cont.)*

28           direct appeal, by virtue of the Nevada Supreme Court's mandatory review, it is not  
procedurally defaulted.

1 Morelli, an agent of the government, into the jail to obtain incriminating statements from  
2 Mr. Snow in violation of his right to counsel.” *Id.* at 42.

3 These appeared in a state habeas petition for the first time in Snow’s fourth state  
4 habeas petition, initiated April 25, 2008. Snow points to no previous presentation of any  
5 of those claims in state court.

6 Snow argues that the Nevada Supreme Court’s ruling, with respect to these  
7 claims, was not independent of federal law, in that the procedural ruling was intertwined  
8 with the merits of the claim. See Opposition to Motion to Dismiss, pp. 39-42. The  
9 following is the Nevada Supreme Court’s ruling on the question of cause and prejudice  
10 for the procedural bar:

11 Snow argues that the district court erred by dismissing his post-  
12 conviction petition as procedurally barred because he established good  
13 cause and prejudice by showing that the State withheld material evidence  
14 in violation of *Brady*, 373 U.S. 83. *Brady* obliges a prosecutor to reveal  
15 evidence favorable to the defense when that evidence is material to guilt,  
16 punishment, or impeachment. *Mazzan v. Warden*, 116 Nev. 48, 66, 993  
17 P.2d 25, 36 (2000). There are three components to a successful *Brady*  
18 claim: “the evidence at issue is favorable to the accused; the evidence  
19 was withheld by the state, either intentionally or inadvertently; and  
20 prejudice ensued, i.e., the evidence was material.” *Id.* at 67, 993 P.2d at  
21 37. We have acknowledged that “a *Brady* violation does not result if the  
22 defendant, exercising reasonable diligence, could have obtained the  
23 information.” *Rippo v. State*, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028  
24 (1997).

25 When a *Brady* claim is raised in the context of a procedurally  
26 barred post-conviction petition, the petitioner has the burden of  
27 demonstrating good cause for his failure to present the claim earlier and  
28 actual prejudice. *State v. Bennett*, 119 Nev 589, 599, 81 P.3d 1, 8 (2003);  
*Mazzan*, 116 Nev. at 67, 993 P.2d at 37. As a general rule, “[g]ood cause  
and prejudice parallel the second and third *Brady* components; in other  
words, proving that the State withheld the evidence generally establishes  
cause, and proving that the withheld evidence was material establishes  
prejudice.” *Bennett*, 119 Nev. at 599, 81 P.3d at 8. But a *Brady* claim still  
must be raised within a reasonable time after discovery of the withheld  
evidence. See *Hathaway v. State*, 119 Nev. 248, 254-55, 71 P.3d 503,  
507-08 (2003); see also *Harris v. Warden*, 114 Nev 956, 959 & 959-60  
n.4, 964 P.2d 785, 788 & 788-89 n.4 (1998).

29 Snow points to five categories of evidence that he alleges were  
30 withheld by the State and argues that the State’s withholding the evidence  
31 precluded him from raising the *Brady* claim earlier and resulted in  
32 prejudice: (1) evidence related to Richard Morelli, (2) evidence related to  
33 Kathy Faltinowski, (3) evidence related to Jody and Arlen Edwards, (4)  
34 evidence related to Malinda Barwick, and (5) evidence related to other

1 suspects. And although Snow obtained much of the alleged *Brady*  
2 material several years before he filed the instant petition, he argues that  
3 the State's ongoing failure to comply with post-conviction discovery  
procedures delayed the filing of his petition, as it took several years and  
federal court intervention to secure the challenged material from the State.

4 Having carefully reviewed each of Snow's *Brady* claims, we  
5 conclude that he failed to demonstrate good cause for his delay in raising  
6 those claims, as the evidence was discovered or disclosed years before  
Snow filed the instant petition or could have been discovered through  
7 reasonable diligence, was privileged, or its relevance was unclear.  
[Footnote omitted.] However, even if he had demonstrated good cause,  
8 we conclude that he failed to show that any of the challenged evidence  
was material such that it affected the outcome of his trial. Therefore, we  
9 conclude that the district court did not err by summarily dismissing Snow's  
*Brady* claims.

10 Order of Affirmance, Respondents' Exhibit 24, pp. 3-5 (emphasis added). Thus, the  
11 Nevada Supreme Court, while acknowledging that the cause-and-prejudice analysis  
12 overlapped the merits of the *Brady* claims, ruled, in the quoted passage, on Snow's  
13 argument that he could show cause-and-prejudice to overcome the procedural bar. In  
14 making its ruling, the Nevada Supreme Court used the term "materiality," and  
15 considered whether the allegedly withheld evidence was material, but the court plainly  
16 did so only in judging whether Snow had made a showing of prejudice.

17 When a state court determines that a state procedural bar applies, and looks at  
18 the merits of the federal constitutional claim for the purpose of determining whether the  
19 petitioner can show cause and prejudice to overcome the procedural bar, the state  
20 court's application of the bar is not considered to be intertwined with the merits of the  
21 federal claim such as to deprive the state procedural bar of its independence. See  
22 *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir.1996). The Nevada Supreme Court's  
23 application of NRS 34.726 was independent of federal law.

24 Also with regard to these claims, Snow asserts that he can show cause and  
25 prejudice for the procedural default. See Opposition to Motion to Dismiss, pp. 42-46. In  
26 his somewhat convoluted discussion in this regard, Snow argues the strength of his  
27 *Brady* claims with respect to the Morelli, Faltinowski, and Edwards material, but Snow  
28 does not explain how he was prevented from bringing those *Brady* claims in state court

1 within the state limitations period. As the Nevada Supreme Court ruled, the subject  
2 material was discovered years before Snow initiated his fourth state habeas action.  
3 Snow does not show cause and prejudice for the procedural default of Claims 1 and 2.

4 Claims 1A, 1B, 1C, 1D, 1E, and 2 are barred from litigation in this federal habeas  
5 action by the procedural default doctrine.

## 6 **2. Claim 4**

7 In Claim 4, Snow claims that his constitutional rights were violated “due to the  
8 seating of jurors on Mr. Snow’s jury who were not impartial.” Second Amended Petition,  
9 p. 62. This claim concerns jurors Lorraine Van Compernelle and Dorothy Hansen. *Id.*  
10 at 62-69.

11 The Court finds that Claim 4 is not procedurally defaulted, because Snow raised  
12 the claim before the Nevada Supreme Court on his direct appeal. See Appellant’s  
13 Opening Brief, Respondents’ Exhibit 3, pp. 40-49; Appellant’s Reply Brief, Petitioner’s  
14 Exhibit 210, pp. 21-26. In that briefing, Snow stated that his claim was made, in part,  
15 under the United States Constitution. See Appellant’s Opening Brief, Respondents’  
16 Exhibit 3, p. 40 (“The Nevada and United States Constitutions both provide for the right  
17 to a jury trial and the right to due process of law at said trial.”); Appellant’s Reply Brief,  
18 Petitioner’s Exhibit 210, p. 26 (“[T]he Defendant was obviously denied . . . the protection  
19 of the United States Constitution due process of law. . . .”).

20 As Snow raised Claim 4 on his direct appeal, it is not barred from litigation in this  
21 federal habeas action by the doctrine of procedural default.

## 22 **3. Claim 5 and the Related Part of Claim 16**

23 In Claim 5, Snow claims that his constitutional rights were violated “due to the  
24 trial court’s failure to remove juror Gordon Buchanan, who was actually and impliedly  
25 biased against Mr. Snow, and who contaminated the jury with extraneous information.”  
26 Second Amended Petition, p. 70. In Claim 16, Snow claims that his constitutional rights  
27 were violated “because Mr. Snow was not afforded effective assistance of counsel on  
28 appeal.” *Id.* at 146. Claim 16 has several subparts, including a claim that Snow’s

1 constitutional rights were violated by the failure of his appellate counsel to raise Claim 5  
2 on appeal. *Id.*

3 On the appeal in his first state habeas action, Snow did assert a claim that his  
4 appellate counsel was ineffective for failing to raise, on his direct appeal, the claim that  
5 is now Claim 5. See Brief of Appellant, Respondents' Exhibit 6a, pp. 50-57. Therefore,  
6 the part of Claim 16 concerning appellate counsel's failure to raise Claim 5 on appeal is  
7 not procedurally defaulted.

8 Snow argues that the ineffective assistance of his appellate counsel, in failing to  
9 raise Claim 5 on his direct appeal, was cause for his procedural default of Claim 5.  
10 However, the procedural bar at issue is the state-law statute of limitations applied by the  
11 Nevada Supreme Court to the claims asserted in Snow's fourth state habeas action in  
12 2008. Snow's claim of ineffective assistance of counsel on his direct appeal only  
13 speaks to his counsel's failure to raise this claim on that appeal, which was completed  
14 on August 28, 1985. Snow's argument does not speak to his delay from 1985 to 2008,  
15 before he raised the claim in his fourth state habeas action. Nor does the claim of  
16 ineffective assistance of his counsel on the direct appeal explain the abandonment of  
17 this claim on appeal in his first state habeas action. See Petition for Writ of Habeas  
18 Corpus, Respondents' Exhibit 4, p. 15, item 42; Brief of Appellant, Respondents' Exhibit  
19 6a. Snow does not make a colorable showing of cause for the procedural default of  
20 Claim 5. Claim 5 is barred from litigation in this federal habeas action by the procedural  
21 default doctrine.

#### 22 **4. Claim 6**

23 In Claim 6, Snow claims that his constitutional rights were violated "due to  
24 manipulation during the grand jury selection process which deprived Mr. Snow of his  
25 right to a fair cross-section of the community." Second Amended Petition, p. 78.

26 ///

27 ///

28 ///

1           Regarding this claim, in his opposition to the motion to dismiss, Snow states:

2           Mr. Snow acknowledges that this claim was raised for the first time in state  
3           court in 2008, but alleges that he can overcome the procedural default  
4           bars because the factual basis for this claim was not reasonably available  
5           to counsel until 2004.

6           Opposition to Motion to Dismiss, p. 53 (*citing Murray v. Carrier*, 477 U.S. 478, 488  
7           (1986)).

8           However, even accepting as true Snow's allegations regarding the facts  
9           underlying this claim, Snow does not explain – and does not show cause for – the delay  
10          from 2004 until 2008 in asserting this claim in state court. Snow does not show cause  
11          for the procedural default that arose from his failure to comply with the state statute of  
12          limitations with regard to this claim.

13          The Court finds Claim 6 to be barred from litigation in this federal habeas action  
14          by the procedural default doctrine.

#### 15                           **5.       Claim 8 and the Related Part of Claim 16**

16          In Claim 8, Snow claims that his constitutional rights were violated “due to  
17          improper arguments by the prosecution which distorted the fact finding process and  
18          rendered the trial fundamentally unfair.” Second Amended Petition, p. 84. In Claim 16,  
19          Snow claims that his constitutional rights were violated “because Mr. Snow was not  
20          afforded effective assistance of counsel on appeal.” *Id.* at 146. Claim 16 has several  
21          subparts, including a claim that Snow's constitutional rights were violated by the failure  
22          of his appellate counsel to raise Claim 8 on appeal. *Id.*

23          Snow argues that he raised Claim 8 on his direct appeal, and, therefore, it was  
24          not procedurally defaulted. See Opposition to Motion to Dismiss, pp. 55-56. Snow did,  
25          on his direct appeal, complain about some of the arguments of the prosecution that are  
26          now the subject of Claim 8, but on the direct appeal Snow did not claim that those  
27          arguments by the prosecution deprived him of his federal constitutional rights.  
28          See Appellant's Opening Brief, Respondents' Exhibit 3, pp. 19-35. Snow's citation, in  
his briefing on the direct appeal, of the cases of *Farmer v. State*, 95 Nev. 849, 603 P.2d

1 700 (1979), and *McGuire v. State*, 100 Nev. 153, 677 P.2d 1060 (1984), did not serve to  
2 alert the Nevada Supreme Court that Snow meant to raise a federal constitutional issue.  
3 Nor was the briefing by the state on the appeal such that the Nevada Supreme Court  
4 would have understood there to be a federal constitutional issue. See Respondents'  
5 Answering Brief, Petitioner's Exhibit 209, pp. 36-46. Moreover, the opinion of the  
6 Nevada Supreme Court, on the direct appeal, gives no indication that the court  
7 understood there to be a federal constitutional issue raised with respect to the  
8 allegations of improper argument by the prosecution. See *Snow v. State*, 101 Nev. 439,  
9 446-48, 705 P.2d 632, 638-39 (1985).

10 Snow also argues that ineffective assistance of his appellate counsel, in failing to  
11 raise Claim 8 on his direct appeal, was cause for his procedural default of Claim 8. See  
12 Opposition to Motion to Dismiss, pp. 56-57. However, Snow's claim of ineffective  
13 assistance of counsel on his direct appeal only speaks to his counsel's failure to raise  
14 this claim on that appeal, which was completed August 28, 1985; Snow's argument  
15 does not explain his delay from 1985 to 2008, before he raised this claim, in federal  
16 constitutional terms, in his fourth state habeas action. Snow has not shown cause for  
17 the procedural default of Claim 8. Claim 8 is barred from litigation in this federal habeas  
18 action by the procedural default doctrine.

19 On the appeal in his first state habeas action, Snow did assert a claim that his  
20 appellate counsel was ineffective for failing to raise, on his direct appeal, claims  
21 regarding certain alleged improper argument by the prosecution. See Brief of Appellant,  
22 Respondents' Exhibit 6a, pp. 36-49. On that appeal, Snow complained of his appellate  
23 counsel's failure to raise, on direct appeal, the argument that the prosecutor improperly  
24 injected his own opinion into his closing argument in the penalty phase of the trial.  
25 See *id.* at 39-45. Therefore, to the extent that Snow claims that his appellate counsel  
26 was ineffective, on his direct appeal, for failing to raise the argument that the prosecutor  
27 improperly injected his own opinion into his closing argument in the penalty phase of the  
28 trial, Claim 16 is not procedurally defaulted.

1                               **6.       Claim 9**

2               In Claim 9, Snow claims that his constitutional rights were violated “due to the  
3 trial court’s exclusion of the exculpatory testimony from Terry Hardaway and David  
4 Springfield.” Second Amended Petition, p. 90.<sup>6</sup>

5               Snow raised Claim 9 in his first state habeas action, but abandoned it on the  
6 appeal in that action. See Petition for Writ of Habeas Corpus, Respondents’ Exhibit 4,  
7 p. 10, item 27; Brief of Appellant, Respondents’ Exhibit 6a. Snow argues that the  
8 ineffectiveness of his trial counsel in failing to offer alternative grounds for the admission  
9 of the testimony of Hardaway and Springfield, and for failing to offer their testimony at  
10 the penalty phase, as alleged in Claim 10D, constitutes cause for his procedural default  
11 of Claim 9. This argument is meritless. Snow’s claim of ineffective assistance of trial  
12 counsel in this regard does not explain his delay from the time of his trial until 2008  
13 before raising Claim 9 in his fourth state habeas action. Claim 9 is barred from litigation  
14 in this federal habeas action by the procedural default doctrine.

15                               **7.       Claim 10B**

16               In Claim 10B, Snow claims that his trial counsel was ineffective for “completely  
17 abandoning his role as advocate for Mr. Snow” during penalty phase closing arguments.  
18 Second Amended Petition, p. 100. Snow asserts, and the Court finds, that Claim 10B  
19 was raised on the appeal in his first state habeas proceeding, and is, therefore, not  
20 procedurally defaulted. See Brief of Appellant, Respondent’s Exhibit 6a, pp. 101-04.

21       ///

22       ///

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23               <sup>6</sup>Claim 10D is closely related to Claim 9. Snow claims in Claim 10D that his trial  
24 counsel was ineffective “for failing to offer alternative grounds for the admission of the  
25 testimony of Mr. Hardaway and Mr. Springfield, and for failing to offer their testimony at  
26 the penalty phase.” Second Amended Petition, p. 108. Respondents do not assert the  
27 procedural default defense with respect to Claim 10D. The court notes that Snow did,  
28 on the appeal in his first state habeas action, claim that his trial counsel was ineffective  
for not offering additional grounds for admission of the testimony of Hardaway and  
Springfield during the guilt phase of his trial, and for not offering the testimony of  
Hardaway and Springfield during the penalty phase of his trial. See Brief of Appellant,  
Respondents’ Exhibit 6a, pp. 70-78. Claim 10D is not procedurally defaulted.

1                   **8.      Claim 10F**

2           In Claim 10F, Snow claims that his trial counsel was ineffective “for failing to  
3 properly object and move for a hearing regarding *ex parte* communications and  
4 misconduct by juror Buchanan.” Second Amended Petition, p. 114. Snow asserts that  
5 Claim 10F was raised on the appeal in his first state habeas proceeding, and is,  
6 therefore, not procedurally defaulted. Opposition to Motion to Dismiss, p. 58. However,  
7 on the appeal in his first state habeas proceeding, the question of counsel’s handling of  
8 juror Buchanan’s conduct was raised as only an issue of ineffective assistance of  
9 appellate counsel – not ineffective assistance of trial counsel. See Brief of Appellant,  
10 Respondent’s Exhibit 6a, pp. 50-56. Claim 10F is procedurally defaulted.

11                   **9.      Claim 10H**

12           In Claim 10H, Snow claims that his trial counsel was ineffective “for failing to  
13 impeach Sally Cook’s testimony regarding the height of the hit man.” Second Amended  
14 Petition, p. 115. Snow asserts that Claim 10H was raised on the appeal in his first state  
15 habeas proceeding, and is, therefore, not procedurally defaulted. Opposition to Motion  
16 to Dismiss, p. 58. However, Snow does not point to, and the Court does not see, any  
17 argument in his briefing on the appeal in his first state habeas action where he raised  
18 the same claim that is raised in this case as Claim 10H. Claim 10H is procedurally  
19 defaulted.

20                   **10.     Claim 10K**

21           In Claim 10K, Snow claims that his trial counsel was ineffective “for failing to  
22 investigate or present any mitigating evidence at Mr. Snow’s capital sentencing  
23 hearing.” Second Amended Petition, p. 120.

24           In the appeal in his first state habeas action, Snow raised a claim that his trial  
25 counsel was ineffective because he “failed to present evidence that petitioner had once  
26 saved the life of a prison guard, and evidence that in the past, two physicians had  
27 stated their opinion that petitioner was legally insane.” Brief of Appellant, Respondent’s  
28 Exhibit 6a, pp. 86-100. Therefore, Claim 10K is not procedurally defaulted to the extent

1 Snow asserts in 10K that his trial counsel was ineffective for failing to present such  
2 evidence. The remainder of Claim 10K is procedurally defaulted.

3 **11. Claim 10N**

4 In Claim 10N, Snow claims that his trial counsel was ineffective “for failing to  
5 investigate and raise Claims Three through Nine, Twelve through Fifteen, Nineteen and  
6 Twenty.” Second Amended Petition, p. 130.

7 Respondents argue that Claim 10N is procedurally defaulted, except to the  
8 extent that Snow claims that his trial counsel was ineffective for failing to object to  
9 improper closing argument of the prosecutor as was alleged on appeal in his first state  
10 habeas action. See Motion to Dismiss, p. 69. On the appeal in his first state habeas  
11 action, Snow asserted a claim that his trial counsel was ineffective for failing to raise  
12 any issue regarding the prosecutor improperly injecting his own opinion into his closing  
13 argument in the penalty phase of the trial. See Brief of Appellant, Respondents’ Exhibit  
14 6a, pp. 39-45. Therefore, to the extent that Snow claims, in Claim 10N, that his trial  
15 counsel was ineffective for failing to raise any issue regarding the prosecutor improperly  
16 injecting his own opinion into his closing argument in the penalty phase of the trial,  
17 Claim 10N is not procedurally defaulted. The remainder of Claim 10N is procedurally  
18 defaulted.

19 **12. Claim 11**

20 In Claim 11, Snow claims that his constitutional rights were violated “because of  
21 the trial court’s failure to properly instruct the jury concerning the weight to be given  
22 accomplice testimony.” Second Amended Petition, p. 131.

23 Snow asserts, and the Court finds, that Snow raised Claim 11 in his second state  
24 habeas action, which was initiated October 26, 1987. See Supplemental Petition for Writ  
25 of Habeas Corpus, Petitioner’s Exhibit 227, p. 7. The claim was, however, dismissed by  
26 the state district court, and, before Snow could file an opening brief on appeal, the  
27 Nevada Supreme Court affirmed, finding the claim barred as a successive petition,  
28 under NRS 34.810. See Order Dismissing Appeal, Respondents’ Exhibit 11. NRS

34.810, however, was inadequate to support the defense of procedural default. See *Valerio v. Crawford*, 306 F.3d 742, 777-78 (9th Cir. 2002). Therefore, Claim 11 is not procedurally defaulted.

### 13. Claim 12A

In Claim 12A, Snow claims that his constitutional rights were violated by a jury instruction given by the court regarding premeditation and deliberation. Second Amended Petition, pp. 133-35. The jury instruction that Snow challenges is known as the “*Kazalyn* instruction,” after *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992).

Snow argues that the statute of limitations prescribed by NRS 34.726 is inadequate to support the procedural default of a claim regarding the *Kazalyn* instruction, because the Nevada Supreme Court has, on several occasions applied a special limitations period to such claims, and has, in some of those cases, reached the merits of the challenge to the *Kazalyn* instruction. See Opposition to Motion to Dismiss, pp. 90-91. Snow quotes from *Doleman v. State*, 2011 WL 221912 (Nev., Jan. 13, 2011):

Because it is the substantive holdings of [*Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007)] and [*Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000)] that appellant seeks to apply in this case, it is those cases that provide the marker for filing timely claims.

*Doleman v. State*, 2011 WL 221912, at 1 (Nev., Jan. 13, 2011); see also *Green v. Palmer*, 2010 WL 5239191, at 1 (Nev., Dec. 10, 2010), *Herrera v. State*, 2010 WL 4537128, at 1 (Nev., Nov. 8, 2010), *Jones v. State*, 2010 WL 3860441, at 1 n.4 (Nev., Sep. 29, 2010), *Guerrero v. State*, 2010 WL 3554312, at 2 (Nev., Sep. 10, 2010), *Klein v. State*, 2010 WL 3502815, at 1 (Nev., July 15, 2010), *Jamison v. State*, 2010 WL 3488529, at 1 (Nev., June 10, 2010), *Ducksworth v. State*, 2010 WL 3315877, at 1 (Nev., June 9, 2010), *Tinch v. State*, 2010 WL 3502705, at 1 (Nev., June 9, 2010), *Carpino v. State*, 2010 WL 3502752, at 1 (Nev., June 9, 2010), and *Burriola v. State*, 2010 WL 3492123, at 2 (Nev., May 7, 2010). Snow also cites the following cases in which the petitioners filed their claims challenging the *Kazalyn* instruction within one (1) year after the *Polk* decision – by September 11, 2008 – and he claims the court

1 adjudicated their claims on the merits: *Winfrey v. State*, 2011 WL 222250, at 1 (Nev.,  
 2 Jan. 13, 2011), *Nellums v. State*, 2011 WL 486606, at 1 (Nev., Feb. 9, 2011), *Witter v.*  
 3 *State*, 2010 WL 4673531, at 1-2 (Nev., Nov. 17, 2010), *Gaston v. State*, 2009 WL  
 4 3711916, at 1-2 (Nev., Nov. 3, 2009), *Berry v. State*, 2009 WL 3192937, at 1-2 (Nev.,  
 5 Sep. 23, 2009). In fact, the Nevada Supreme Court did not reach the merits of the  
 6 challenge to the *Kazalyn* instruction in *Winfrey*, *Nellums*, *Witter*, *Gaston*, or *Berry*, or in  
 7 any of the other cases cited by Snow. Contrary to Snow's characterization of those  
 8 cases, in each case the Nevada Supreme Court applied the procedural bar, and  
 9 declined to reach the merits. The Court finds that, under *Bennett v. Mueller*, Snow has  
 10 failed to carry his burden to place the procedural default defense at issue "by asserting  
 11 specific factual allegations that demonstrate the inadequacy of the state procedure,  
 12 including citation to authority demonstrating inconsistent application of the rule." See  
 13 *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003). Claim 12A is procedurally  
 14 defaulted.

#### 15 **14. Claim 19**

16 In Claim 19, Snow claims that his constitutional rights were violated "due to the  
 17 cumulative errors in the admission of evidence and instructions, gross misconduct by  
 18 state officials and witnesses, and the systematic deprivation of [Mr. Snow's] right to the  
 19 effective assistance of counsel." Second Amended Petition, p. 160. This is a cumulative  
 20 error claim. The Court finds that it is not procedurally defaulted to the same extent that  
 21 the claims it incorporates are not procedurally defaulted. Therefore, Claim 19 is not  
 22 barred by the procedural default doctrine.

#### 23 **15. Claim 20**

24 In Claim 20, Snow claims that his "death sentence is invalid under the state and  
 25 federal constitutional guarantees of due process, equal protection, and a reliable  
 26 sentence because execution by lethal injection violates the constitutional prohibition  
 27 against cruel and unusual punishments." Second Amended Petition, p. 162. Snow  
 28 argues that, in light of the holding of the Nevada Supreme Court in *McConnell v. State*,

1 125 Nev. 243, 212 P.3d 307 (2009), the state courts do not provide a forum in which to  
2 litigate this claim. Opposition to Motion to Dismiss, pp. 103-04. This argument is well-  
3 taken. Challenges to the lethal injection protocol are not cognizable in Nevada state  
4 habeas actions. See *McConnell*, 125 Nev. at 247-49, 212 P.3d at 309-11. This Court,  
5 therefore, will not require exhaustion of that claim, and, consequently, the procedural  
6 default doctrine cannot be applied. See 28 U.S.C. § 2254(b)(1)(B)(i) and (ii).

7  
8 **V. SNOW'S REQUEST FOR AN EVIDENTIARY HEARING ON PROCEDURAL  
DEFAULT ISSUES**

9 In his motion for evidentiary hearing, and the reply he filed in support of that  
10 motion, Snow requests an evidentiary hearing with respect to certain factual matters  
11 related to the procedural default issues raised by the motion to dismiss.

12 Snow requests an evidentiary hearing concerning his argument that he can show  
13 cause and prejudice for his procedural default of Claims 1, 2, 6, and 20, because of the  
14 delay in his discovery of the factual bases for those claims. Motion for Evidentiary  
15 Hearing, pp. 5-7. With respect to Claim 20, the Court rejects the procedural default  
16 defense, because Snow has shown that challenges to the lethal injection protocol are  
17 not cognizable in Nevada state habeas actions (see discussion, *supra*, regarding Claim  
18 20); therefore, an evidentiary hearing is not necessary on this issue. With respect to  
19 Claims 1 and 2, the Court found that the record was clear, and the Nevada Supreme  
20 Court ruled, that the subject material was discovered years before Snow initiated his  
21 fourth state habeas action, and that there was, consequently, no showing of cause and  
22 prejudice. See discussion, *supra*, regarding Claims 1 and 2. Similarly, with respect to  
23 Claim 6, the Court takes as true Snow's assertion regarding when he discovered the  
24 factual basis of the claim. See discussion, *supra*, regarding Claim 6. There is no factual  
25 dispute, and no need for an evidentiary hearing, with regard to these issues.

26 Snow also requests an evidentiary hearing concerning his argument that he can  
27 show cause and prejudice for the procedural default of his ineffective assistance of trial  
28 counsel claims in Claim 10, because of ineffective assistance of counsel in his first state

1 habeas action. See Motion for Evidentiary Hearing, pp. 7-8. With regard to that  
2 argument, however, the Court rules that ineffective assistance of Snow's first state post-  
3 conviction counsel cannot explain the long delay that led to Snow's default under NRS §  
4 34.726, with regard to Snow's claims of ineffective assistance of trial counsel, and that  
5 there is an insufficient causal connection between the alleged ineffective assistance of  
6 Snow's first post-conviction counsel and the procedural default at issue in this case.  
7 See discussion, *supra*, regarding Snow's claims of ineffective assistance of trial  
8 counsel. This ruling does not turn on any question of fact; there is no need for an  
9 evidentiary hearing on this issue.

10 Snow also requests an evidentiary hearing concerning his argument that he can  
11 show cause and prejudice for his procedural default of Claims 3, 5, and 8, because of  
12 the ineffective assistance of counsel on his direct appeal. See Motion for Evidentiary  
13 Hearing, pp. 8-9. The Court finds that Claim 3 is not procedurally defaulted.  
14 See discussion, *supra*, regarding Claim 3. With respect to Claims 5 and 8, the Court  
15 rules that Snow's claim of ineffective assistance of counsel on his direct appeal does  
16 not explain his delay from 1985 to 2008, before he raised Claims 5 and 8 in his fourth  
17 state habeas action; and, with regard to Claim 5, the Court rules that Snow's claim of  
18 ineffective assistance of counsel on his direct appeal does not explain the abandonment  
19 of this claim on appeal in his first state habeas action. See discussions of Claims 5 and  
20 8, *supra*. These rulings do not turn on any question of fact; there is no need for an  
21 evidentiary hearing on these issues.

## 22 VI. SUMMARY OF THE COURT'S RULINGS

23 The Court, then, rules that the following of Snow's claims are barred by the  
24 statute of limitations: 2, 5, 6, 10B, 10F, 10G, 10I, 10J, 10L (to the extent it concerns the  
25 jury instruction regarding premeditation and the lack of a jury instruction regarding the  
26 requirement that aggravating circumstances be found unanimously by the jury), 10M (to  
27 the extent it concerns the lack of a jury instruction regarding the requirement that  
28 aggravating circumstances be found unanimously by the jury), 10N (to the extent it is

1 based on trial counsel's failure to raise Claims 5, 6, 12A, 13B, 13C, 19, and 20), 12A,  
2 13B, 13C, 16 (to the extent it is based on appellate counsel's failure to raise Claims 5,  
3 6, 12A, 13B, 13C, 19, and 20), 17, 18, 20, and 21.

4 The Court rules that the following of Snow's claims are barred by the procedural  
5 default doctrine: 1A, 1B, 1C, 1D, 1E, 2, 5, 6, 7, 8, 9, 10A, 10C, 10E, 10F, 10G, 10H,  
6 10I, 10J, 10K (except to the extent Snow claims that his trial counsel was ineffective for  
7 failing to present evidence that Snow had once saved the life of a prison guard, and  
8 evidence that in the past two (2) physicians had stated their opinion that Snow was  
9 legally insane), 10L, 10M, 10N (except to the extent that Snow claims that his trial  
10 counsel was ineffective for failing to raise the claim in Claim 8 that the prosecutor  
11 improperly injected his own opinion into his closing argument in the penalty phase of the  
12 trial), 12A, 12B, 13A, 13B, 13C, 15, 16 (except to the extent that Snow claims that his  
13 appellate counsel was ineffective on his direct appeal for failing to raise Claims 3 and 5,  
14 and the claim in Claim 8 that the prosecutor improperly injected his own opinion into his  
15 closing argument in the penalty phase of the trial), 17, 18, and 21.

16 The following of Snow's claims are, therefore, subject to dismissal, either on  
17 statute of limitations grounds, procedural default grounds, or both: 1A, 1B, 1C, 1D, 1E,  
18 2, 5, 6, 7, 8, 9, 10A, 10B, 10C, 10E, 10F, 10G, 10H, 10I, 10J, 10K (except to the extent  
19 Snow claims that his trial counsel was ineffective for failing to present evidence that  
20 Snow had once saved the life of a prison guard, and evidence that in the past two (2)  
21 physicians had stated their opinion that Snow was legally insane), 10L, 10M, 10N  
22 (except to the extent that Snow claims that his trial counsel was ineffective for failing to  
23 raise the claim in Claim 8 that the prosecutor improperly injected his own opinion into  
24 his closing argument in the penalty phase of the trial), 12A, 12B, 13A, 13B, 13C, 15, 16  
25 (except to the extent that Snow claims that his appellate counsel was ineffective on his  
26 direct appeal for failing to raise Claim 3, and for failing to raise the claim in Claim 8 that  
27 the prosecutor improperly injected his own opinion into his closing argument in the  
28 penalty phase of the trial), 17, 18, 20, and 21.

**VII. CONCLUSION**

IT IS THEREFORE ORDERED that respondents' Motion to Dismiss (dkt. no. 146) is GRANTED IN PART AND DENIED IN PART. The following claims in petitioner's second amended habeas corpus petition (dkt. no. 137) are dismissed: Claim 1A, 1B, 1C, 1D, 1E, 2, 5, 6, 7, 8, 9, 10A, 10B, 10C, 10E, 10F, 10G, 10H, 10I, 10J, 10K (except to the extent Snow claims that his trial counsel was ineffective for failing to present evidence that Snow had once saved the life of a prison guard, and evidence that in the past two (2) physicians had stated their opinion that Snow was legally insane), 10L, 10M, 10N (except to the extent that Snow claims that his trial counsel was ineffective for failing to raise the claim in Claim 8 that the prosecutor improperly injected his own opinion into his closing argument in the penalty phase of the trial), 12A, 12B, 13A, 13B, 13C, 15, 16 (except to the extent that Snow claims that his appellate counsel was ineffective on his direct appeal for failing to raise Claim 3, and for failing to raise the claim in Claim 8 that the prosecutor improperly injected his own opinion into his closing argument in the penalty phase of the trial), 17, 18, 20, and 21. In all other respects, the motion to dismiss is denied.

IT IS FURTHER ORDERED that petitioner's Motion for an Evidentiary Hearing (dkt. no. 159) is DENIED.

IT IS FURTHER ORDERED that respondents shall file an answer within ninety (90) days from the entry of this order, responding to the remaining claims in petitioner's second amended habeas corpus petition (dkt. no. 137), which are Claims 3, 4, 10D, 10K (to the extent Snow claims that his trial counsel was ineffective for failing to present evidence that Snow had once saved the life of a prison guard, and evidence that in the past two physicians had stated their opinion that Snow was legally insane), 10N (to the extent that Snow claims that his trial counsel was ineffective for failing to raise the claim in Claim 8 that the prosecutor improperly injected his own opinion into his closing argument in the penalty phase of the trial), 11, 14, 16 (to the extent that Snow claims that his appellate counsel was ineffective on his direct appeal for failing to raise Claim 3,

1 and for failing to raise the claim in Claim 8 that the prosecutor improperly injected his  
2 own opinion into his closing argument in the penalty phase of the trial), and 19.

3  
4 DATED THIS 12<sup>th</sup> day of September 2013.

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7 MIRANDA M. DU  
8 UNITED STATES DISTRICT JUDGE  
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